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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER

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INDEX

Page

TABLE OF AUTHORITIES ..... (iii)
OPINIONS BELOW 1
JURISDICTION 1
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
SUMMARY OF ARGUMENT 13
ARGUMENT:
I. Petitioner has standing to raise a clear violation of Vanessa Cox's Fourth Amendment rights as a violation of his own constitutional rights on the basis that he owned the property seized and the offense charged is the unlawful possession of that property 22
A. Petitioner was entitled to automatic standing to contest the search of Vanessa Cox's purse because he was charged with offenses that included, as an essential element of each offense charged, possession of the seized evidence at the time of the contested search and seizure 28
B. Petitioner was entitled to actual standing to contest the search of Vanessa Cox's purse because he claimed ownership of the seized property 46
C. Petitioner was entitled to contest the search of Vanessa Cox's purse because that search violated his reasonable expectation of privacy 58

IV. The search of petitioner's person, ostensibly conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs 62

III. The Fourth and Fourteenth Amendments were violated by the search of Vanessa Cox's purse and the seizure of its contents when that search was conducted pursuant to a warrant which authorized only a search of the premises of the residence in which she was a visitor 74

IV. The search of petitioner's person, ostensibl conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegl search and seizure of contraband drugs 82

CONCLUSION 84

TABLE OF AUTHORITIES

Page

Cases:

Adams v. Williams, 407 U.S. 143 (1972) 66

Agnello v. United States, 269 U.S. 20 (1925) 33

Alderman v. United States, 394 U.S. 165 (1969) 22,49

Brinegar v. United States, 338 U.S. 160 (1949) 67

Brown v. Illinois, 422 U.S. 590 (1975) 63,66,72

Brown v. United States, 411 U.S. 223 (1973) ..... *passim*

Burns v. State, Okl. Cr., 595 P. 2d 801 (1979) 24

California v. Green, 399 U.S. 149 (1970) 35,36

Carroll v. United States, 267 U.S. 132 (1925) 67

Combs v. United States, 408 U.S. 224 (1972) 47,55

Cupp v. Murphy, 412 U.S. 291 (1973) 82

Davis v. Mississippi, 394 U.S. 721 (1969) 66,67

Delaware v. Prouse, XXX U.S. XXX
99 S. Ct. 139 (1979) 66

Dunaway v. New York, ___ U.S. ___
98 S. Ct. 2248 (1979)..... *passim*

Duncan v. State, 276 Md. 715, 351 A. 2d 144 (1976 37

Edwards v. Commonwealth, Ky., 573 S.W. 2d 640 (1978)c .. 35

Harris v. New York, 401 U.S. 222 (1971) 33,34

Jett v. Commonwealth, Ky., 436 S.W. 2d 788 (1969) 36

Johnson v. Commonwealth, Ky., 443 S.W. 2d 20 (1968) .. 68

Johnson v. United States, 333 U.S. 10 (1948) 68

Jones v. United States, 362 U.S. 257 (1960) ..... *passim*

Katz v. United States, 389 U.S. 347 (1967) 60,61

Ker v. California, 374 U.S. 23 (1963) 68

Mancusi v. DeForte, 392 U.S. 364 (1968) 25,47,60

Michigan v. Defillippo, XXX U.S. XXX,
99 S. Ct. 2627 (1979 67

Michigan v. Tyler, XXX U.S. XXX,
98 S. Ct. 1942 (1978) 57,58
Mincey v. Arizona, XXX U.S. XXX,
98 S. Ct. 2408 (1978) 57,58,74
Miranda v. Arizona, 384 U.S. 436 (1966) 34
Nardone v. United States, 308 U.S. 338 (1939) 39
New Jersey v. Porthash, XXX U.S. XXX,
99 S. Ct. 1292 (1979) 34
Pennsylvania v. Mimms, 434 U.S. 196 (1977) 66
People v. Douglas, 66 Cal. App. 3d 998,
136 Cal. Rptr. 358 (1977) 32,35
People v. Hilber, 403 Mich. 312,
269 N.W. 2d 159 (1978) 69
People v. Sturgis, 58 Ill. 2d 211,
317 N.E. 2d 545 (1974) 32
Rakas v. Illinois, 439 U.S. 128 (1978) .....*passim*
Rawlings v. Commonwealth, Ky.,
581 S.W. 2d 348 (1979) .....*passim*
Sibron v. New York, 392 U.S. 40 (1968) 70,76
Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920) 39
Simmons v. United States, 390 U.S. 377 (1968) .....*passim*
State v. Lukefahr, La., 363 So. 2d 661 (1978) 39
State v. Matthews, N.D., 216 N.W. 2d 90 (1974) 28
State v. Petrovich, 125 N.J. Super. 147,
309 A. 2d 281 (1973) 32
State v. Schoendaller, Mont. 578 P. 2d 730 (1978) 69
Terry v. Ohio, 392 U.S. 1 (1968) 11,64,65,66,78,79
United States v. Archbold-Newball, 554 F. 2d 665
(5th Cir. 1977) 50
United States v. Balsamo, 468 F. Supp. 1363
(S.D. Me. 1979) 24,25
United States v. Boston, 510 F. 2d 35
(9th Cir. 1974) 25,46

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 66
United States v. Bruneau, 594 F. 2d 1190
(8th Cir. 1979) 24
United States v. Byers, 600 F. 2d 1130
(5th Cir. 1979) 24
United States v. Ceccolini, XXX U.S. XXX,
98 S. Ct. 1054 (1978) 63,73
United States v. Cella, 568 F. 2d 1266
(9th Cir. 1977) 25
United States v. Cobb, 432 F. 2d 716
(4th Cir. 1970) 46
United States v. Galante, 547 F. 2d 733
(2nd Cir. 1976) 51,54
United States v. Guerrera, 554 F. 2d 987
(9th Cir. 1977) 25
Unites States v. Hunter, 550 F. 2d 1066
(6th Cir. 1977) 43,44,51
United States v. Jackson, 585 F. 2d 653
(4th Cir. 1978) 51
United States v. Jeffers, 342 U.S. 48 (1951) 52,54,55
United States v. Kahan, 415 U.S. 239 (1974) 33
United States v. Lisk, 522 F. 2d 228
(7th Cir. 1975) 51,52
United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 66
United States v. Mazzelli, 595 F. 2d 1157
(9th Cir. 1979) 24,48
United States v. Oates, 560 F. 2d 45
(2nd Cir. 1977) 46
United States v. Reyes, 595 F. 2d 275
(5th Cir. 1979) 46
United States v. Sacco, 436 F. 2d 780
(2nd Cir. 1971) 54

United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979) 24
United States v. Smith, 550 F. 2d 277 (5th Cir. 1977) 51
United States v. Tortorello, 533 F. 2d 809 (2nd Cir. 1976) 28
United States v. Wilson, 536 F. 2d 883 (9th Cir. 1976) 50,60
Walder v. United States, 347 U.S. 62 (1954) 33
Wong Sun v. United States, 371 U.S. 471 (1963) ....*passim*
Ybarra v. Illinois, XXX U.S. XXX, 100 S. Ct. 338 (1979) .....*passim*

Other Authorities:

Frank & Rosenthal, *Marijuana Grower's Guide* (Berkeley 1978) 69
Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 Emory L. J. 111 (1974) 50
Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo. L. Rev. 1 (1975) 54
3 LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* (1980) .....*passim*
Note, 64 Geo. L. J. 1187 (1976) 54
Ringel, *Searches & Seizures, Arrests and Confessions* (2nd Ed. 1979) 34
Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment,* 41 Brooklyn L. Rev. 421 (1975) 43

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Appendix, hereinafter designated App., pp. 76-83) is reported as *Rawlings v. Kentucky,* Ky., 581 S.W. 2d 348 (1979). The opinion of the Court of Appeals of Kentucky (App., pp. 61-67) is not reported.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 1, 1979. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on May 22, 1979 (App., p. 84). The petition for writ of certiorari was granted on December 10, 1979 (App., p. 85). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner has standing to raise a clear violation of Vanessa Cox's Fourth Amendment rights as a violation of his own constitutional rights on the basis that he owned the property seized and the offense charged is the unlawful possession of that property.

2. Whether the searches and seizures which produced the contraband drugs and other incriminating evidence were the fruits of the unconstitutional arrests of both petitioner and Vanessa Cox, in violation of the Fourth and Fourteenth Amendments of the Federal Constitution.

3. Whether the Fourth and Fourteenth Amendments were violated by the search of Vanessa Cox's purse and the seizure of its contents when that search was conducted pursuant to a warrant which authorized only a search of the premises of the residence in which she was a visitor.

4. Whether the search of petitioner's person, ostensibly conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendent to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the middle of the afternoon of October 18, 1976, some six police officers, members of both the Kentucky State Police and a local law enforcement agency, armed with an *arrest* warrant for Lawrence Marquess, forcibly entered his residence in Bowling Green, Kentucky (Transcript of Evidence, hereinafter designated as T.E., pp. 132-133, 151-152, 181, 196; Transcript of Suppression Hearing of November 29, 1976, hereinafter designated as T.S.H. (I), pp. 2-3; App., pp. 30-31).[1] Upon entering the premises, the police found five individuals in the living room of the Marquess residence - the petitioner David Rawlings, Vanessa Cox, Linda Braden, Keith Northern and Dennis Saddler (T.S.H. (I), p. 4; App., p. 31). During the course of the search of the residence for Marquess, the officers noted the odor of burned marijuana and in another room observed on a

[1]The police possessed a bench warrant for the arrest of Lawrence Marquess on the felony charge of trafficking in LSD (T.E., p. 132). According to police testimony, Marquess, some three or four months prior to the issuance of the arrest warrant, had at his Bowling Green residence sold a quantity of LSD to an undercover agent (T.S.H. (I), p. 3; App., p. 30; T.E., p. 179).

mantel what appeared to be marijuana seeds (T.E., pp. 133-135, 152-153, 182, 197; T.S.H. (I), pp. 3-5; App., p. 31).[2] Marquess, who was under indictment for trafficking in Schedule I controlled substances, was not found during the search of his residence.

The police officers then decided that a search warrant for the house was needed and two of the officers left to procure the warrant (T.E., pp. 136, 153, 182, 197; T.S.H. (I), p. 5; App., p. 31). During the forty-five minute wait for the two officers to secure the warrant and return to the residence, the five individuals, including petitioner, were detained in the living room and were informed by the police that they could not leave the room unless they consented to a search of their person (T.E., pp. 25-27, 38-40, 110-111, 153, 182-183, 197-198; Transcript of Suppression Hearing, December 1, 1976, hereinafter designated as T.S.H. (II), pp. 8-10; App., pp. 45-46). Two of the individuals present, Linda Braden and Keith Northern, were permitted to leave after submitting to a search (T.E., pp. 26, 40, 110, 198; T.S.H. (II), p. 10; App., p. 46).

After approximately forty-five minutes, the two police officers returned to the residence with a search warrant, authorizing a search of the premises (T.E., pp. 138-139, 154-155; T.S.H. (I), pp. 5, 14-15; App., pp. 31-32, 36-37). This search warrant did not authorize the search of individuals on the premises (T.S.H. (I), p. 19; App., p. 39; T.E., p 167).

[2]In Kentucky the possession of marijuana for personal use is a misdemeanor. Kentucky Revised Statutes (KRS) 218A.990(7) provides that "[a]ny person who knowingly and unlawfully possesses for his own use or transfers marijuana shall be confined in the county jail for not more than 90 days or be fined not more than $250." Although "[m]arijuana" is defined in KRS Chapter 218A to mean "all parts of the plant Cannabis sativa L.," including "the seeds thereof," the definition specifically excludes "the sterilized seed of the plant which is incapable of germination." KRS 218A.010(9).

Two of the three individuals remaining in the living room, Vanessa Cox and petitioner, were seated on a couch with Ms. Cox's purse placed on the couch between them (T.E., pp. 27, 45, 141; T.S.H. (I), p. 6; App., p. 32). One of the officers ordered Vanessa Cox to stand and empty her purse onto the table (T.E., pp. 144,155). When the contents were emptied from the purse, numerous vials and bottles containing controlled substances and an address book were exposed to view (T.E., pp. 13, 16-17, 19, 28, 45-46, 47, 50-51, 149, 155; T.S.H. (I), p. 8; App., p. 33). Vanessa Cox informed the police officers that the drugs and other items belonged to petitioner; at that juncture petitioner admitted that he was the owner of the drugs discovered in Ms. Cox's purse (T.E., pp. 28-29, 31, 47, 100-101, 149-150; T.S.H. (I), pp. 9, 11-12; App., pp. 34-35). petitioner, prior to the initial arrival of the police, had placed the drugs and the address book in the purse belonging to Vanessa Cox (T.E., pp. 12-15, 23-24, 35, 100; T.S.H. (I), p. 12; T.S.H. (II), pp. 3-4, 20; App., pp. 35, 42-43, 51-52).

While the purse belonging to Vanessa Cox was being emptied, petitioner was asked by the police to stand to be searched. At that point petitioner admitted ownership of the drugs found in the purse and was immediately subjected to a search of his person. The search revealed a wad of bills in the amount of $4,500 and a knife in a sheath. Petitioner was then formally placed under arrest (T.E., pp. 15-48, 145-146, 149-150, 156, 160; T.S.H. (I), pp. 9-10, 16-17; T.S.H. (II), pp. 11-13; App., pp. 33-34, 38, 46-48).

On October 27, 1976 petitioner, David Rawlings, was indicted by the Warren Circuit Court Grand Jury in Bowling Green, Kentucky on four counts of trafficking in controlled

substances classified in Schedules I, II and III in violation of Kentucky Revised Statues (KRS) 218A.990(2) (Transcript of Record, hereinafter designated T.R., pp. 1-4; App., pp. 4-7). According to the indictments, the controlled substances were LSD, Benzphetamine, Methamphamine, and Methyprylon (T.R., pp. 1-4; App., pp. 4-7). On November 1, 1976, petitioner was also indicted in the Warren Circuit Court for the offense of trafficking in a controlled substance classified in Schedule II, Pentobarbital, in violation of KRS 218A.990(2) (T.R., p. 9; App., p. 8).[3]

Petitioner on November 3, 1976 filed a pretrial motion "to suppress all evidence seized in this action because said evidence was derived from an illegal arrest . . .without probable cause by the arresting officers" (T.R., p. 14; App., p. 9). On November 15, 1976, petitioner filed a motion to suppress the evidence confiscated in the case due to the defective search warrant and the illegal arrest (T.R., p. 24; App., p. 10). On November 18, 1976 petitioner filed a motion "to suppress all evidence seized in this action pursuant to a [s]earch [w]arrant . . . in that said [s]earch [w]arrant does not specifically name any individual to be searched" (T.R., p. 44; App., p. 11).

On November 29 and December 1, 1976, evidentiary

[3]KRS 218A.990(2) provides that "[a]ny person who knowingly and unlawfully traffics in a controlled substance classified in Schedule I or II other than a narcotic drug, except marijuana, or in any controlled substance classified in Schedule III," commits a criminal offense. "Traffic" as used in KRS 218A.010(19).means to manufacture, sell, transfer or possess with intent to sell a controlled substance." KRS 218A.010(19).

Each of the five indictments alleged that petitioner did, "[o]n or about the 18 day of October A.D., 1976, . . . have in his possession, for the purpose of sale," the particular controlled substance (T.R., pp. 1-4, 9; App., pp. 4-8).

hearings were held on the defense motions to suppress. At the latter hearing, petitioner took the witness stand and asserted his ownership of the drugs which the police had discovered in Ms. Cox's purse (T.S.H. (II), pp. 3-7; App., pp. 42-44). The defense motions to suppress were overruled at the conclusion of the December evidentiary hearing (T.S.H. (II), pp. 27, 30; App., pp. 55-57).

Following the overruling of the suppression motions, petitioner sought and received the trial court's permission to waive his constitutional right to trial by jury (T.S.H. (II), pp. 30-34; T.R., pp. 48-49; App., ppg. 57-59, 13-14). Consequently, petitioner was tried by a judge alone on December 2 and 3, 1976.

During the course of the trial the drugs and address book seized from the purse were introduced into evidence as was the money taken from petitioner (T.E., pp. 145-146, 157-159). Although the knife seized from petitioner was not physically available at the time of trial, prosecution witnesses referred to it in the course of their testimony (T.E., pp. 145,160).

At the conclusion of the presentation of evidence, the defense renewed its motion to suppress (T.E., p. 216). The trial judge then withheld the verdict and allowed the prosecution and defense to file simultaneous briefs on the merits of the suppression motion (T.E., p. 234; T.R., p.56; App., p. 16).

On February 11, 1977, the trial court again overruled the defense motions to suppress and also determined that petitioner was without standing to object to the search of Ms. Cox's purse and the seizure of the drugs found in the purse (T.R., pp. 90-94; App., pp. 18-22).

That same day petitioner, contrary to his plea, was convicted in the Warren Circuit Court of the offense of

trafficking in a controlled substance classified in Schedule I in violation of KRS 218A.990(2) and was sentenced to imprisonment for five years and a fine of three thousand dollars ($3,000.000). Petitioner was also convicted of four counts of possession of controlled substances classified in Schedules II and III in violation of KRS 218A.990(6) and sentenced on each count to confinement in the county jail for one year and a fine of five hundred dollars ($500.00) (T.R., pp. 95-96; App., pp. 22-23). The sentences of confinement were to run concurrently for a total of five years of imprisonment (T.R., p. 101; App., p. 25).

In a timely motion for a new trial, petitioner again asserted that the searches and seizures in his case were in violation of the United States Constitution (T.R., p. 97; App., p.24). That motion was denied on March 11, 1977 and final judgment was entered that same day (T.R., p 101; App., p 25-26). A timely notice of appeal was filed by petitioner (T.R., p. 102; App., p. 27).

On February 17, 1978 the Court of Appeals of Kentucky rendered it opinion in petitioner's case and affirmed the judgement of conviction and sentence. *David Rawlings v. Commonwealth,* Court of Appeals of Kentucky, File No. CA-1185-MR, decided February 17, 1978 (App., pp. 61-67). Kentucky's intermediate appellate court noted that on appeal petitioner essentially "contends that he had standing to complain about the search of Ms. Cox's purse; that the search of Ms. Cox's purse was not authorized by the warrant, based on probable cause, or justified by the exigencies of the circumstances involved; that the search warrant for the premises did not authorize the search of all persons on the premises; and that their detention was not based upon probable cause and was, in effect, unreasonable restriction of their freedom" (App., p. 62).

The Court of Appeals determined that petitioner "did have standing to protest the search of Ms. Cox's purse," but decided the search of the purse was not invalid (App., pp. 63-65).

On June 9, 1978 the Kentucky Court of Appeals denied petitioner's petition for rehearing (App., p. 68). At that time, a dissenting opinion was filed in the case (App., pp. 69-74). the dissenting judge concluded that petitioner and Ms. Cox had been illegally arrested in violation of the Fourth Amendment and that this initial illegality rendered the subsequent searches and seizures also unconstitutional (App., p. 70-73). The dissenter also rejected the majority's holding that the search of Ms. Cox's purse was within the scope of a warrant authorizing only the search of the premises (App., p. 73-74).

Petitioner's timely motion for discretionary review was granted by the Supreme Court of Kentucky on November 14, 1978 (App., p. 75). On May 1, 1979 the Kentucky Supreme Court rendered its opinion in petitioner's case and affirmed the opinion of the Court of Appeals (App., pp. 76-83). *Rawlings v. Commonwealth,* Ky., 581 S.W.2d 348 (1979).

According to the majority opinion, "[t]he central issue in this case is the warrantless search of Vanessa Cox's purse." *Id.* at 349. In resolving that issue, the Kentucky court was "confronted with the proposition of 'standing' on the part of [petitioner] to raise the Fourth Amendment issue and the ultimate issue - the merits of the Fourth Amendment argument." *Id.*

The majority opinion of the Kentucky Supreme Court unabashedly announced, "All in all we confess that we find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally

incapable of understanding." *Id.*

Nevertheless, the majority held "the evidence obtained by the search of Vanessa Cox's Purse was properly admitted at trial" and noted that petitioner "*probably* does not have standing to raise the issue here." *Id.* at 349 (emphasis added).

The majority acknowledged that *Jones v. United States,* 362 U.S. 257 (1960), "apparently would confer standing on the theory that possession of the drugs both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt." *Id.* But the Kentucky Supreme Court reasoned that petitioner "did not find himself in that dilemma" because "he admitted ownership of the drugs when the drugs appeared from the purse and Vanessa Cox stated the drugs belonged to him." *Id.*

Although admittedly "not sure of the effect of" *Rakas v. Illinois,,* 439 U.S. 128 (1978), the majority of the Kentucky court felt *Rakas* "seems to reject the theory of *Jones* on 'standing.' " *Rawlings v. Commonwealth, supra* at 349-350. Consequently, the Kentucky Supreme court held "the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." *Id.* at 350.

Addressing the issue of the search of petitioner's person, the majority "prefer[red] to validate this search on the theory of a search incident to a valid arrest." *Id.*

Addressing the issue of the search of petitioner's person, the majority "prefer[red] to validate this search on the theory of a search incident to a valid arrest." *Id.* The Kentucky Supreme Court emphatically stated its intention to "disregard as irrelevant the detention during which the officers were procuring a search warrant." *Id.*

Justice Lukowsky of the Kentucky Supreme Court filed a

dissenting opinion in the instant case and concluded that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." *Id.* at 350, citing *Wong Sun v. United States,* 371 U.S. 481 (1963). Justice Lukowsky reasoned that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search . . . constituted an arrest because it significantly deprived those individuals of their freedom of action." *Rawlings vs. Commonwealth, supra* at 350, citing *Terry v. Ohio,* 392 U.S. 1 (1968).

According to the dissenting justice, this "was not an investigatory stop but an arrest because the detention here went well beyond the bounds of permissible investigatory stops." *Rawlings v. Commonwealth, supra* at 350. Justice Lukowsky emphasized that this arrest of petitioner and the others was unlawful because "no misdemeanor had been committed in the presence of the police officers." *Id.* at 350-351.

As the dissent explains, "[b]ut for the unlawful detention of [petitioner] and the others present in the house, the police would not have discovered any evidence against [petitioner]." *Id.* at 351. All the discovered evidence "was a result of the unlawful detention and should be suppressed as 'fruit of the poisonous tree.' " *Id.*

In the second portion of his dissent, Justice Lukowsky explained that, even if petitioner and the others present were not illegally arrested during the forty-five minute detention, "the search of Cox's purse was unlawful because the search was beyond the perimeter of the search warrant and consequently unreasonable under the Fourth Amendment." *Id.* at 351. The dissent perceived the "real issue" as "whether [petitioner] should be permitted to raise the clear

violation of Cox's Fourth Amendment rights as a violation of his own on the basis that he owned the property seized and the offense charged is the possession of that property." *Id.*

The dissent characterized *Rakas* as "substantially different from the instant case" since it "involved a non-possessory offense and the articles seized were not owned by or in the possession of the defendants." *Rawlings v. Commonwealth, supra* at 351, citing *Rakas v. Illinois, supra* at 130 n.1. The dissenting justice acknowledged that *Rakas* had "reformulated the test for standing to contest a search," but added that the decision "left undisturbed the automatic standing rule articulated in *Jones v. United States,* [citation omitted], for possessory offenses." *Rawlings v. Commonwealth, supra* at 351-352.

Because petitioner "is charged with a possessory offense," the dissenting justice chastised that "the Commonwealth should not be heard to say that his possession of these drugs is sufficient to support his conviction but insufficient to support a reasonable expectation of privacy when they are concealed in the purse of a companion." *Id.* at 352. According to the dissent, petitioner "was entitled to expect that governmental officials would intrude into the purse only with consent or by complying with the Fourth Amendment." *Id.* Because "the search of Cox's purse was an unreasonable search and seizure," the dissenting judge reasoned "its results should be suppressed." *Id.*

Lastly, addressing the search of petitioner's person, the dissent found that search "unlawful because it was not incident to a valid arrest." *Id.* The " 'second' arrest upon which the search was based was itself unlawful because it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse." *Id.*

SUMMARY OF ARGUMENT

I.

As a general rule, Fourth Amendment rights may not be vicariously asserted. Ordinarily, one who seeks to challenge the legality of a search as a basis for suppressing relevant evidence is required to allege, and if the allegation be disputed to establish, that he himself was the victim of an invasion of privacy.

Although this Court has recently discarded as analytically unhelpful the "standing" terminology, the nomenclature of "standing" provides a shorthand method of identifying, at least historically, the interests of the defendant which the Fourth Amendment was designed to protect.

In the now obsolete phraselogy of "standing," a defendant, to contest a search or seizure on Fourth Amendment grounds, must have either "automatic standing" (standing implied as a matter of law) or "actual standing" (standing established by the facts of the case).

The Supreme Court of Kentucky rejected David Rawlings' clear constitutional entitlement to challenge the search of Ms. Cox's purse on the basis of either *actual* or *automatic* standing and held the evidence obtained by the warrantless search of the purse was properly admitted at trial.

The applicability of the automatic standing rule has apparently been delimited to cases where the defendant is charged with an offense that includes, as an essential element of the charged crime, possession of the seized evidence at the time of the contested search and seizure. All of the factors in the instant case - the nature of the offenses,

the form of the charges, the prosecution's theory, and the Commonwealth's evidence in chief - clearly entitle petitioner to automatic standing.

Two distinct and severable constitutional problems both justify and necessitate continued adherence to the rule of automatic standing: (1) "the self-incrimination dilemma" which inheres in a defendant's need to allege possession to contest a seizure, when such an admission could later be used against him; and (2) "the vice of prosecutorial self-contradiction" which would allow the prosecution to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes.

Although a defendant is now permitted to establish standing by claiming possession of incriminating evidence without that testimony being directly admissible against him at the trial, three substantial aspects of self-incrimination continue to plague the defendant whose testimony is needed to challenge the legality of a search and seizure.

First, a defendant who wishes to testify at the suppression hearing on his entitlement to challenge the search and seizure must weigh the very real risk that the prosecution may use the defendant's suppression testimony to impeach his trial testimony. Second, in those jurisdictions which permit prior inconsistent statements to be introduced at trial as substantive as well as impeachment evidence, a defendant, desiring to testify on his own behalf at a suppression hearing to establish standing, must seriously question whether the prosecution will be constitutionally entitled to introduce as substantive evidence of guilt any of his statements from the suppression hearing which would marginally qualify as inconsistent with his trial testimony. Third, the prosecution continues to have the ability to exploit the defendant's testimony at the suppression hearing

to extricate incriminating information which may generate investigative leads to enhance the government's case on the existing charges or to produce new, but related charges against the accused.

Since several aspects of the self-incrimination dilemma - notably impeachment, substantive use of prior inconsistent statements, and prosecutorial "fishing expeditions," whether eventually prohibited or destined to be exceptions to the general rule, persist, the dilemma itself endures as a constitutional problem of sufficient magnitude not only to justify, but to mandate the contined viability of the principle of "automatic standing."

The incongruity associated with the vice of prosecutorial self-contradiction is readily apparent where the prosecution at the suppression hearing defeats the defendant's standing claim by vigorously asserting that the defendant has failed to demonstrate any possessory interest in the premises searched or the evidence seized, but then at trial presents witnesses whose testimony is solely calculated to establish a sufficient possessory connection between the accused and the seized evidence to sustain a conviction of the charged possession offenses. This hypothetical illustrates the concern that a rule of "automatic" standing is needed to preclude "the injustice of an internally inconsistent conviction."

When the prosecution's entire case - the offense charged, the theory of the offense, and the supporting evidence - ultimately depends on the defendant's possession, as construed under the applicable penal law, of the evidence seized during the challenged search, the state should not be granted the prerogative of denying at a suppression hearing that the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was

designed to protect.

Assuming *arguendo* that petitioner was not entitled to "automatic" standing to contest the search and seizure at bar, he still met his burden of establishing actual standing due to his admission of ownership of the drugs seized from Ms. Cox's purse both at the time of the search and later at the suppression hearing. This Court has repeatedly acknowledged the constitutional tenet that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.

There can be no doubt, either historically or analytically, that the Fourth Amendment was designed to protect against governmental infringement of an actual ownership or possessory interest in the property seized, even when the seizure occurred during a search of the person or premises of a third party.

An individual's right to privacy from governmental intrusion into his personal effects does not require that he have physical control of the property. He can reasonably expect that his lawfully possessed effects will remain undisturbed upon premises where they have been lawfully placed or in the custody of a third party to whom they are lawfully entrusted. The key factor in this "standing" analysis is that the defendant must demonstrate *actual* ownership or possessory interest in the property seized.

A determination of the contraband nature of the property seized is an artifical factor for evaluating whether a defendant has a cognizable Fourth Amendment interest in the evidence seized from a third party since this reasoning would impermissibly convict the suspect even before the evidence against him was gathered. The use of a "contraband" criterion for ascertaining whether a Fourth Amendment right has been violated would, in many

instances, expand the suppression hearing into a miniature replica of the trial on the merits.

The capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Petitioner took normal precautions to maintain his privacy by placing various items including the drugs in Ms. Cox's purse; this was accomplished with her knowledge. Petitioner's ownership or possessory interest in the items he placed in Ms. Cox's purse created a legitimate expectation of privacy.

It was undoubtedly reasonable for petitioner to expect that the items he entrusted to Ms. Cox for storage and even transportation in her purse would remain private to the rest of the world. The expectation of privacy was more than a subjective expectation of not having the items discovered, it was an expectation that society is prepared to recognize as reasonable.

In the final analysis petitioner was constitutionally entitled to contest the legality of the search of Ms. Cox's purse on three distinct, but invariably intertwined concepts - the "automatic" standing rule, standing generated by an actual possessory or ownership interest in the property seized, and a "reasonable and legitimate expectation of privacy." All three of these methodologies function to demonstrate that the police search of Ms. Cox's purse and the seizure of petitioner's personal property infringed an interest of the petitioner which the Fourth Amendment was designed to protect.

II.

The searches of both Vanessa Cox and petitioner, the seizure of evidence from both parties, and the statements by both parties incriminating petitioner were the fruits of the unlawful arrests of Ms. Cox and petitioner and, consequently, must be suppressed.

There can be little doubt that petitioner, Vanessa Cox, and the three other people present were seized when they were told by the police that they must remain at the Marquess residence unless they consented to a search of their persons and effects. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.

In all but certain narrowly defined intrusions, the seizures are reasonable only if supported by probable cause. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed arrests or investigatory detentions.

The warrantless arrest/detention of petitioner and the other people present at the Marquess residence was unconstitutional because it was not supported by probable cause to arrest.

The detention of Ms. Cox and petitioner was in important respects indistinguishable from traditional arrest. All of the perons present were specifically informed by the police that they could not leave the premises unless they would agree to waive a Fourth Amendment right and submit to a search of their person and effects. The period of detention lasted approximately forty-five minutes during which the detainees were under the personal supervision of some four or five police officers.

Petitioner, Vanessa Cox, and one other individual were detained for approximaely forty-five minutes. The detention was not accomplished as a formal arrest and it was not for the purpose of custodial interrogation. Nevertheless, this detention of petitioner and the others was an investigatory seizure which intruded so severely on the interests protected by the Fourth Amendment that it could be justified only on the basis of probable cause to arrest.

Accordingly, all evidence discovered in the case at bar was a result of this unlawful detention and should be suppressed as "fruit of the poisonous tree."

III.

The warrantless search of Ms. Cox's purse was unconstitutional and the evidence seized from within must be suppressed since no exigent circumstances existed.

At the time of the search and seizure in question, the police possessed a warrant, authorizing a search of the premises, but not a search of the individuals on the premises.

Each person present in Lawrence Marquess' residence on the date in question was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by Lawrence Marquess, the person who resided at the house in question. Although the search warrant, if issued upon probable cause, provided the officers with authority to search the premises, it provided them with no authority whatever to invade the constitutional protections possessed individually by the persons legitimately on the premises.

A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.

A warrant to search a place cannot normally be construed to authorize a search of each individual in that place. The warrant for the search of the Marquess residence provided no basis for departing from this general rule.

No distinction may be drawn between Ms. Cox's personal effects and the purse. At all relevant times the purse was in close proximity to Ms. Cox and the police treated the purse as her property, not as an adjunct of the premises.

A warrant authorizing the search of the premises may not be used as a basis for searching the people present at the time the warrant is executed.

The prosecution and the police officers attempted to justify the search of Ms. Cox on the grounds that fear for their personal safety, under the circumstances of the case, motivated and permitted their actions. Yet, the initial search of Ms. Cox's purse was simply not supported by a reasonable belief that she was armed and presently dangerous, a belief which must form the predicate to a patdown of a person for weapons.

In the final analysis, the prosecution was unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Venessa Cox or petitioner was armed and dangerous.

A law enforcement officer for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. But nothing in this doctrine can be understood to allow a generalized cursory search for weapons. The narrow scope of this exception does not permit a frisk for weapons on less than reasonable belief or

suspicion directed at th person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.

The prosecution's improper use of both the items, including the drugs in question, illegally seized from Ms. Cox's purse and petitioner's tainted admissions of ownership of the drugs renders petitioner's state court conviction constitutionally invalid and mandates reversal of the conviction below.

IV.

The court below validated the search of petitioner's person on the theory of a search incident to a valid arrest and observed that, after petitioner admitted ownership of the drugs, the police were entitled to arrest and search his person, or search and then arrest. This analysis, however, is susceptible to challenge.

Assuming *arguendo,* first, that petitioner is constantly entitled to challenge the search of Ms. Cox's purse and the attendant seizure of the contraband drugs and, second, that the search of that purse and the seizure of its contents were constitutionally improper, then the virtually contemporaneous arrest and search of petitioner, predicated on the prior illegality, were the "fruits of the poisonous tree" and any evidence obtained thereby must be suppressed.

Virtually no time elapsed between the primary illegality and the search and arrest of petitioner; similarly, no intervening circumstances occurred. All in all, no factor exists which arguably could dissipate the taint of the primary illegality.

Accordingly, the items seized during the search of petitioner were required to be suppressed and excluded in all

manner from petitioner's state trial. This failure to suppress constituted a substantial violation of petitioner's Fourth and Fourteenth Amendment rights which mandates reversal of petitioner's conviction.

ARGUMENT

I.

PETITIONER HAS STANDING TO RAISE A CLEAR VIOLATION OF VANESSA COX'S FOURTH AMENDMENT RIGHTS AS A VIOLATION OF HIS OWN CONSTITUTIONAL RIGHTS ON THE BASIS THAT HE OWNED THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE UNLAWFUL POSSESSION OF THAT PROPERTY.

As a general rule, Fourth Amendment rights may not be vicariously asserted.[4] *Alderman v. United States,* 394 U.S. 165, 174 (1969); *Rakas v. Illinois,* 439 U.S. 128, 133-134 (1978). "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if

[4]"Fourth Amendment rights are personal rights which, like some other constitutional rightrs, may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174 (1969), cited with approval in *Rakas v. Illinois,* 439 U.S. 128, 133-136 (1978); *see Brown v. United States,* 411 U.S. 223, 230 (1973); *Simmons v. United States,* 390 U.S. 377, 389 (1968). However, the "automatic standing" rule of *Jones v. United States,* 362 U.S. 257 (1960), "is, of course, one which may allow a defendant to assert the Fourth Amendment rights of another." *Rakas v. Illinois, supra* at 135 n.4.

the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." *Jones v. United States,* 362 U.S. 257, 261 (1960).

For years the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure had been evaluated, at least in phraseology, in terms of "standing." *See Jones v. United States, supra.*

In 1978 in *Rakas v. Illinois, supra,* this Court had "occasion to re-examine the 'standing' terminology emphasized in *Jones*" to consider "the necessity for continued adherence to the notion of standing . . . as a concept that is theoretically distinct from the merits of a defendant's Fourth Amendment claim." *Rakas v. Illinois, supra* at 133.

After reaffirming the principle that the rights assured by the Fourth Amendment "may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure,"[5] this Court addressed the question of "whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim." *Id.* at 138-139.

Endorsing the "[r]igorous application of the principle that the rights secured by [the Fourth] Amendment are personal, in place of a notion of 'standing,' " this Court reasoned that, even though "the inquiry under either approach is the same," the "better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139.

This Court in *Rakas* was admittedly "under no illusion

[5]*Simmons v. United States,* 390 U.S. 377, 389 (1968).

that by dispensing with the rubric of standing used in *Jones*," it had "rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure." *Rakas v. Illinois, supra* at 140.

The *Rakas* decision, in effectuating a change in parlance and methodology but not substantive inquiry, has generated some confusion among various trial and appellate courts of this Nation concerning the continued constitutional viability in Fourth Amendment matters of the analytical principles which had been subsumed under the label "standing."[6] This confusion is nowhere better expressed than in petitioner's case where the Supreme Court of Kentucky unabashedly announced, "All in all we confess that we find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." *Rawlings v. Commonwealth,* Ky., 581 S.W.2d 348, 349 (1979).

Even though the *Rakas* decision discarded as analytically unhelpful the "standing" terminology, the nomenclature of "standing" persists in the lexicon of the appellate courts and provides a shorthand method of identifying, at least historically, the interests of the defendant which the Fourth Amendment was designed to protect.[7]

Viewed in the now obsolete phraseology of "standing," a defendant, to contest a search or seizure on Fourth Amendment grounds, must have either "actual standing" or

[6]*See United States v. Mazzelli,* 595 F.2d 1157, 1159-1160 (9th Cir. 1979); *United States v. Bruneau,* 594 F.2d 1190, 1193 n. 3 (8th Cir. 1979); *United States v. Salvucci,* 599 F.2d 1094, 1097-1098 (1st Cir. 1979); *United States v. Byers,* 600 F.2d 1130, 1132 (5th Cir. 1979); *United States v. Balsamo,* 468 F.Supp. 1363, 1378 (S.D. Me. 1979); *Burns v. State,* Okl. Cr., 595 P.2d 801, 803 (1979).

[7]See the cases listed at note 6, *supra.*

"automatic standing." *United States v. Balsamo,* 468 F.Supp. 1363, 1378 (S.D. Me. 1979). "[S]tanding to move to suppress can either be implied as a matter of law (automatic standing) or established by the facts of the case (actual standing)." *United States v. Cella,* 568, F.2d 1266, 1280 (9th Cir. 1977), citing *United States v. Guerrera,* 554 F.2d 987, 989 (9th Cir. 1977); *United States v. Boston,* 510 F.2d 35, 37 (9th Cir. 1974), *cert. denied,* 421 U.S. 990 (1975).

Prior to 1960, under "the conventional standing requirement," courts had "generally required that the movant [seeking to suppress evidence obtained as a result of an unconstitutional search and seizure[claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones v. United States, supra* at 261.

By claiming ownership or possession of the seized property or by claiming a substantial possessory interest in the premises searched, a defendant could establish *actual* standing to contest the search and seizure. Throughout the evolution of the concept of standing to raise Fourth Amendment violations, this Court has acknowledged the constitutional principle that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.[8]

The *Jones* decision "established a rule of 'automatic' standing to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged." *Rakas v. Illinois, supra* at 135.

[8]*Simmons v. United States,* 390 U.S. 377, 390-391 (1968); *Mancusi v. DeForte,* 392 U.S. 364, 367 (1968); *Brown v. United States,* 411 U.S. 223, 228 (1973); *Rakas v. Illinois, supra* at 130 n.1, 142 n.11, 148.

When "possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence." *Simmons v. United States,* 390 U.S. 377, 390 (1968).

Automatic standing "elimintes any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." *Jones v. United States, supra* at 263. "The possession on the basis of which [a defendant] is to be . . . conficted suffices to give him standing." *Id.* "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial." *Id.* at 264.

According to the Supreme Court of Kentucky, "[t]he central issue in [petitioner's] case is the warrantless search of Vanessa Cox' of Vanessa Cox's purse." *Rawlings v. Commonwealth, supra,* at 349. In resolving that issue, the Kentucky court was "confronted with the proposition of 'standing' on the part of [petitioner] to raise the Fourth Amendment issue and the ultimate issue - the merits of the Fourth Amendment argument." *Id.*

The Supreme Court of Kentucky, rejecting petitioner's clear constitutional entitlement to challenge the search of Ms. Cox's purse on the basis of either *actual* or *automatic* standing, concluded that petitioner "probably does not have standing to raise the issue" of the warrantless search of the purse and held the evidence obtained by the search "was properly admitted at trial." *Rawlings v. Commonwealth, supra* at 349. This decision to deny petitioner standing was made in the context of the Kentucky Supreme Court's

"confusion" that "the concept of 'standing' [is] totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." *Id.* at 349.

The *Rawlings* court acknowledged that *Jones v. United States, supra,* "apparently would confer standing on the theory that possession of the drug both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt." *Rawlings v. Commonwealth, supra* at 349. However, the Kentucky Supreme Court attempted to distinguish the instant case from *Jones* on the basis that petitioner "did not find himself in that dilemma" because "he admitted ownership of the drugs when [the drugs] appeared from the purse and Vanessa Cox stated the drugs belonged to him." *Id.* Furthermore, the *Rawlings* majority dismissed the "automatic standing" rule because "*Simmons* established that evidence to show standing is not admissible, over objection, on the issue of guilt." *Rawlings v. Commonwealth, supra* at 349.

The Kentucky Supreme Court added that they were "not sure of the effect of *Rakas,*" but felt that the decision "seems to reject the theory of *Jones* on 'standing.' " *Rawlings v. Commonwealth, supra* at 349-350. Consequently, the *Rawlings* court held "the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." *Id.* at 350.

A. PETITIONER WAS ENTITLED TO AUTOMATIC STANDING TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE HE WAS CHARGED WITH OFFENSES THAT INCLUDED, AS AN ESSENTIAL ELEMENT OF EACH OFFENSE CHARGED, POSSESSION OF THE SEIZED EVIDENCE AT THE TIME OF THE CONTESTED SEARCH AND SEIZURE.

The applicability of the automatic standing rule has apparently been delimited to cases "where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.' "[9] *Brown v. United States,* supra at 228. The "automatic standing" rule is not applicable to a situation where "the Government's case against [the defendant] does not depend on [the defendant's] possession of the seized evidence at the time of the contested search and seizure." *Id.* at 228. There is no automatic standing to contest a search and seizure where the defendant was "not charged with an offense that includes, as

[9]This is the most restrictive formulation of the test for applicability of the "automatic standing" rule. Consequently, lower courts have been particularly sensitive to the possibility that a prosecutor may draft the charges in a manner which would appear to negate the defendant's entitlement to automatic standing, such as charging the possession offense occurred on a specific date either before or after the contested search and seizure. For example, in *United States v. Tortorello,* 533 F.2d 809, 814 n.3 (2nd Cir. 1976), the court did "not find controlling... the fact that the indictment charged the defendant with receiving, concealing and storing the stolen coffee '[o]n or about April 23, 1973,' while the search took place on April 30th, several days later." The *Tortorello* court noted that "[t]he dates set forth in the indictment seem to be approximations, since there appears to be no evidence which directly shows that the defendant possessed the [stolen] coffee on April 23rd." *Id. See State v. Matthews,* N.D., 216 N.W.2d 90, 98-99 (1974).

an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Id.* at 229.

There is no doubt that, under the circumstances of the instant case, petitioner was entitled to "automatic standing," even under the most conservative formulation of that doctrine.

Petitioner was charged with five counts of trafficking in controlled substances classified in Schedules I, II and III in violation of KRS 218A.990(2)[10] (T.R., pp. 1-4, 9; App., pp. 4-8). Each of the five indictments alleged that petitioner did, "[o]n or about the 18[th] day of October A.D., 1976, . . . have in his possession, for the purpose of sale," the specific controlled substance which formed the basis of the charge.

The prosecution's theory of culpability charged in each of the five indictments was "possession, for the purpose of sale."[11]

Petitioner was convicted of one count of trafficking in a controlled substance classified in Schedule I and four counts of possession of controlled substances classified in Schedules II and III (T.R., pp. 95-96; App., pp. 22-23).

Equally significant is the fact that the search in question

[10]KRS 218A.990(2) provides that "[a]ny person who knowingly and unlawfully traffics in a controlled substance classified in Schedule I or II other than narcotic drug, except marijuana, or in any controlled substance classified in Schedule III" commits a criminal offense. "Traffic," as used in KRS 218A.990(2), "means to manufacture, sell, transfer or possess with intent to sell a controlled substance." KRS 218A.010(19).

[11]The majority opinion of the Kentucky Supreme Court in the case at bar conceded that under the principles enunciated in *Jones* "possession of the drugs both convicts and confers standing since the offense here is possession." *Rawlings v. Commonwealth, supra* at 349. The dissent below emphasized that "Rawlings is charged with a possessory offense." *Id.* at 352.

occurred on October 18, 1976 - the date of the offense charged in each of the indictments.

At trial, over defense objection, Vanessa Cox, a prosecution witness, testified as to petitioner's statements and actions following the search of her purse which indicated petitioner's ownership of the contraband drugs (T.E., pp. 29-31). Similarly, Railey and Bivens, both state police narcotics agents, testified during the prosecution's case in chief concerning petitioner's admissions of ownership of the drugs in question immediately following the contested search (T.E., pp. 149-151, 155-156). Dennis Saddler's testimony for the prosecution also recounted substantially the same information (T.E., pp. 100-101).

All of the factors - the nature of the offenses, the form of the charges, the prosecution's theory, and the Commonwealth's evidence in chief - clearly entitle petitioner to "automatic standing."

In *Jones* this Court identified two distinct and severable constitutional problems which both justified and necessitated the adoption of the rule of automatic standing: (1) "the self-incrimination dilemma . . . inherent in a defendant's need to allege 'possession' to contest a seizure, when such admission of possession could later be used against him;" and (2) "the vice of prosecutorial self-contradiction," which would allow "the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes." *Brown v. United States, supra* at 227, 229, citing *Jones v. United States, supra* at 262-264.

In *Rakas* this Court observed that it had "not yet had occasion to decide whether the automatic-standing rule of *Jones* survives [the] decision in *Simmons*." *Rakas v. Illinois, supra* at 135 n.4, citing *Brown v. United States,*

supra at 228-229 (1973). This Court in *Brown* had "reserve[d] that question for a case where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged." *Brown v. United States, supra* at 228, citing *Simmons v. United States, supra* at 390.

1. The Dilemma of Self-Incrimination

In *Brown*, this Court explained that "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution" because "a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearig to establish standing to move to suppress evidence." *Brown v. United States, supra* at 228, citing *Simmons v. United States, supra* at 389-394. "[U]nder the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence" and, "whether he succeeds or fails to suppress evidence, his testimony on that score is not directly admissible against him in the trial." *Brown v. United States, supra* at 228.

But the *Brown* decision did "not decide" whether the "automatic" standing rule of *Jones* should remain extant "now that [the] decision in *Simmons* has removed the danger of coerced self-incrimination." *Brown v. United States, supra* at 229.

A determination of the continued viability of the doctrine of automatic standing should not begin with the assumption that the dilemma of self-incrimination was entirely removed or resolved by the *Simmons* decision. Indeed, three substantial aspects of self-incrimination continue to plague the defendant whose testimony is needed to establish standing to challenge the legality of a search and seizure.

a. The Threat of Impeachment

Despite the *Simmons* decision, a defendant who wishes to testify at the suppression hearing on the question of his entitlement to challenge the search and seizure, must weigh the very real risk that the prosecution may use the testimony given at the suppression hearing to impeach the defendant's trial testimony.

Various state appellate courts have endorsed the principle that "the testimony of a defendant or documents voluntarily attested to by him in conjunction with his motion to suppress evidence may not be introduced by the State directly in its case in chief but may be used for purposes of impeachment should the defendant choose to testify at trial." *People v. Sturgis,* 58 Ill.2d 211, 317 N.E. 2d 545, 548 (1974).

A defendant who testifies at a suppression hearing may be required "to answer all relevant questions addressed to him on cross-examination regarding his testimony on the motion to suppress evidence," but then will not be permitted "to contradict his testimony at a later trial on the merits." *State v. Petrovich,* 125 N.J. Super. 147, 309 A.2d 281, 283-284 (1973).

"A defendant's testimony at a suppression hearing may be used for impeachment purposes if he takes the stand at his trial and testifies in a manner inconsistent with his pretrial testimony." *People v. Douglas,* 66 Cal.App.3d 998, 136 Cal.Rptr. 358, 363 (1977).

The wording of this Court's holding in *Simmons* was only that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial *on the issue of guilt* unless he makes no objection." *Simmons v. United States, supra* at 394; emphasis added.

Subsequently, in an endeavor to reiterate the thrust of the *Simmons* holding, this Court paraphrased the rule by noting that "whether he succeeds or fails to suppress the evidence, [a defendant's] testimony [to establish the requisite standing] is not *directly admissible against him* in the trial." *Brown v. United States, supra* at 228; emphasis added. This Court has also observed that "*Simmons* barred the use of pretrial testimony at trial to prove its incriminating content." *United States v. Kahan,* 415 U.S. 239, 243 (1974).

Although this Court has not yet addressed this precise issue, it has concluded in a different context that "[t]he protective shield of *Simmons* [if applicable] is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." *United States v. Kahan, supra* at 243, citing *Harris v. New York,* 401 U.S. 222, 226 (1971).

The issue of whether the protective shield of *Simmons* precludes the prosecution's use of a defendant's testimony at a suppression hearing to impeach his trial testimony is obviously not presented in the instant case and petitioner does not presume to suggest its ultimate resolution.[12] But, the

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[12]The prosecution's use of excluded evidence to impeach a defendant's trial testimony has been addressed by this Court on several occasions.

The prosecutorial ploy of cross-examining a defendant at trial in a manner intended to elicit responses which would justify the admission of suppressed evidence in rebuttal was condemned by this Court long ago. *Agnello v. United States,* 269 U.S. 20 (1925). However, a "defendant's assertion on direct examination [at trial for sale of narcotics] that he never possessed any narcotics" was held in *Walder v. United States,* 347 U.S. 62 (1954), to have "opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized [and suppressed] in connection with an earlier proceeding." *Id.* at 64.

(continued)

existence of this unresolved facet of the self-incrimination dilemma should not be overlooked as an actual deterrent to a criminal defendant's right to seek a judicial determination of his Fourth Amendment claim.[13]

In some jurisdictions once the trial judge is satisfied that a defendant's testimony on the merits is "inconsistent" with prior statements given by the accused at the suppression hearing, he may allow the protective shield of *Simmons* to be lowered, at least for the limited purpose of assailing the

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(footnote continued from preceding page)

In *Harris v. New York*, 401 U.S. 222 (1971), no constitutional infirmity was found in the practice of the prosecution impeaching a defendant's credibility by use of a prior statement made to the police under circumstances rendering it inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), to establish the government's case in chief. Recently, in *New Jersey v. Portash*, ____ U.S. ____, 99 S. Ct. 1292, 1295 (1979), this Court ruled that "a person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial." While "[b]alancing of interests was thought to be necessary . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury," *Portash* emphasized that "information given in response to a grant of immunity" is "compelled" in terms of "the constitutional privilege against compulsory self-incrimination" and [b]alancing, therefore, is not simply unnecessary," it is "impermissible." *Id.* at 1295. It must be remembered that a defendant's testimony at a suppression hearing to establish his right to challenge the legality of a search and seizure is similarly "compelled" because, as *Simmons* acknowledges, the defendant is confronted with the choice "either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons v. United States, supra* at 394. *See* LaFave, 3 *Search and Seizure, A Treatise on the Fourth Amendment*, (1980), §11.2, p. 519.

[13]"[I]t is still arguable after *Simmons*, as courts have held, that the defendant's testimony at trial may be impeached by allegations attested to by the defendant in connection with an unsuccessful motion to suppress." Ringel, *Searches & Seizures, Arrests and Confessions* (2nd Ed. 1979), §20.3(c), p. 20-15.

defendant's credibility. *People v. Douglas, supra; see Edwards v. Commonwealth*, Ky., 573 S.W.2d 640, 641 (1978).

In constructing the shield of *Simmons*, this Court accepted as "obvious that a defendant who knows that his testimony *may be admissible against him at trial* will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." *Simmons v. United States, supra* at 392-393; emphasis added. Significantly, the deterrence factor in *Simmons* was not confined to situations where the defendant feared his suppression testimony would be admissible on the merits of the issue of guilt or innocence. *Simmons* indicated that a deterrent effect would be generated whenever the risk existed that the defendant's suppression testimony could be "admissible against him at trial" for any reason, including impeachment purposes, limited to matters of credibility.

In this regard, the dilemma of self-incrimination survives the *Simmons* decision.

b. The Threat of Substantive Use of Prior Inconsistent Statements

As this Court has previously recognized, the evidence law in a minority of jurisdictions "permit[s] the substantive use of prior inconsistent statements on the theory that the usual dangers of hearsay are largely nonexistent where the witness testifies at trial." *California v. Green*, 399 U.S. 149, 155 (1970). Such a procedure does not run afoul of the Confrontation Clause of the federal constitution. *Id.* at 164.

In Kentucky, for example, "an out-of-court statement made by any person who appears as a witness, which statement is material and relevant to the issues of the case, may be received as substantive evidence through the

testimony of another witness, and need not be limited to impeachment purposes." *Jett v. Commonwealth,* Ky., 436 S.W.2d 788, 792 (1969).

In those jurisdictions which permit prior inconsistent statements to be introduced at trial as substantive as well as impeachment evidence, a defendant, desiring to testify in his own behalf at a suppression hearing to establish standing, must seriously question whether "the protective shield of *Simmons*" would preclude the trial judge from allowing the prosecution to introduce as substantive evidence of guilt any of his statements from the suppression hearing which would marginally qualify as inconsistent with his trial testimony.

Resort to limiting instructions to insure that jurors consider defendant's prior inconsistent statements made at a suppression hearing as only affecting his credibility and not indicating guilt would be constitutionally ineffective. Noting the inability of limiting instructions to cure certain constitutional errors, this Court has acknowledged that there may be "little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well." *California v. Green, supra* at 164.

Regardless of whether a defendant's prior inconsistent statements given at a suppression hearing obtain their status as substantive evidence against the accused on the basis of a jurisdiction's evidence law or due to the realities of the courtroom, it would be myopic for the defendant or his counsel to neglect this phase of the self-incrimination dilemma in assessing the propriety of the defendant testifying at the suppression hearing to establish standing.

c. The Threat of a Prosecutorial "Fishing Expedition"

Perhaps the most serious aspect of the self-incrimination dilemma which has been virtually unaffected by the protective shield erected in *Simmons* is the ability of the prosecution to exploit the defendant's testimony at the suppression hearing to extricate incriminating information which may generate investigative leads to enhance the government's case on the existing charges or to produce new, but related charges against the accused. In the vernacular of the criminal courts, this prosecutorial technique bears the label "fishing expedition."

The fear of the prosecutorial "fishing expedition" is not a conveniently manufactured appellate argument. It is a reality that defendants and their counsel must evaluate daily in the criminal trial courts of this nation.

"[A]n alert prosecutor might well elicit from [defendants testifying at a suppression hearing] small bits of information from which he could well develop the basis for additional investigation calculated to make the State's case stronger." *Duncan v. State,* 276 Md. 715, 351 A.2d 144, 152 (1976). "This represents one of the very vices *Jones* was intended to prevent." *Id.*, 351 A.2d at 152.

In the instant case the prosecutor during the suppression hearing cross-examined petitioner in an endeavor to learn the source of petitioner's drugs, his purpose in obtaining the drugs, and the price petitioner paid for the drugs (T.S.H. (II), pp. 17-19; App., pp. 49-51). In the course of this cross-examination the prosecutor inquired when and how petitioner travelled to Bowling Green, Kentucky and what, if any, drugs were brought by petitioner to Bowling Green (T.S.H. (II), pp. 19-20; App., p. 51-52).

Taking full advantage of his opportunity to question petitioner at the suppression hearing, the prosecutor asked whether petitioner had ever offered the LSD for sale to Dennis Saddler and also the quantity of LSD Saddler had purchased (T.S.H. (II), p. 22; App., pp. 52-53). Pursuing this line of inquiry, the prosecutor asked whether petitioner has ever sold LSD to Vanessa Cox, Lawrence Marquess, or anyone else in Bowling Green (T.S.H. (II), pp. 22-23; App., pp. 52-53). Next the prosecutor blatantly inquired, "Is there anyone else beside those people who you can tell us that you sold the LSD that you had in your possession?" (T.S.H. (II), p. 23; App., p. 53). Following the trial court's overruling of a defense objection, the prosecutor reiterated a rephrased version of the question, "Can you tell this Court anybody else that you sold this to or quoted a price to that can tell this Court you had that [LSD] in your possession at any time?" (T.S.H. (II), p. 23; App., p. 53). When petitioner provided the name of such a person, the prosecutor asked where this person lived, where the sale occurred, and the identity of any other people present at that sale (T.S.H. (II), pp. 23-24; App., pp. 53-54).

Despite repeated defense objections to these questions by the prosecutor, the trial judge permitted the inquiries on the basis that the hearing was "not before a jury" and involved "a law question" (T.S.H. (II), pp. 19-24; App., pp. 51-54).

Confronted with a prosecutorial "fishing expedition" and a trial judge unsympathetic to the defendant's dilemma, defense counsel may find himself virtually powerless to stop the prosecutor's relentless search for inculpatory information and relegated to the function of registering objections.

"A defendant who testifies in a pre-trial suppression hearing is subject to cross-examination as to all issues relevant to such hearing, although not to cross-examination

on the entire case." *State v. Lukefahr,* La., 363 So.2d 661, 663 (1978). "The evidence taken at such hearing is not admissible at the trial of innocence or guilt (the merit trial)." *Id.* "If defendant's counsel feared a fishing expedition, as he claimed, his remedy (if he wished defendant to testify at the hearing) was to object to questions if irrelevant to the hearing's issues, not to offer the defendant as a witness for restricted purposes only." *Id.*

Even the prosecution's indirect or derivative use of evidence elicited from the defendant during his testimony on the question of standing should be precluded by the shield of *Simmons. See Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Nardone v. United States,* 308 U.S. 338 (1939); *Wong Sun v. United States,* 371 U.S. 471 (1963). But as a practical matter, the defense would face considerable difficulty in demonstrating that, "granting establishment of the primary illegality, the evidence to which instant objection [was] made has been come at by exploitation of that illegality" instead of "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States, supra* at 488. Due to the extensive investigative resources often available to the prosecution, the defense may frequently find it unfeasible to expose that the evidence of the prosecution was derived from the accused's suppression testimony rather than the product of legitimate channels of inquiry.

Certainly the "automatic standing" rule alleviates this facet of the self-incrimination dilemma and removes a considerable impediment to the assertion of a Fourth Amendment claim.

Indeed, the death knell of the "self-incrimination dilemma" sounded in *Brown* may have been premature. *Brown v. United States, supra* at 227. Certain aspects of the

dilemma - notably impeachment, substantive use of prior inconsistent statements, and prosecutorial "fishing expeditions," whether ultimately prohibited by *Simmons* or destined to be valid exceptions to that rule, still coalesce to create "an undeniable tension" because an accused may be "obliged either to give up what he believe[s], with advice of counsel, to be a valid Fourth Amendment claim or, in legal affect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons v. United States, supra* at 394.

The automatic standing rule was formulated with an awareness that where the charges "may be established through proof solely of possession" of the items seized during the contested search, a defendant seeking to satisfy "the conventional standing requirement" had traditionally been faced "with the chance that the allegations made on the motion to suppress *may be used against* him." *Jones v. United States, supra* at 261-262; emphasis added.

Because "[t]he dilemma [of self-incrimination] faced by defendants . . . is most extreme in prosecutions for possessory crimes," automatic standing was implied or presumed in cases "where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.' " *Simmons v. United States, supra* at 228. Consequently, since several substantial facets of the self-incrimination dilemma persist despite *Simmons,* the dilemma itself endures as a constitutional problem of sufficient magnitude not only to justify, but to mandate continued adherence to the principle of "automatic standing."

2. The Vice of Prosecutorial Self-contradiction

In *Brown* this Court acknowledged "[t]he vice of allowing the Government to allege possession as part of the

crime charged and yet deny that there was possession sufficient for standing purposes." *Brown v. United States, supra* at 229. When such a tactic is employed, the prosecution can "be accused of taking 'advantage of contradictory positions.' " *Id.*, citing *Jones v. United States, supra* at 263.

Brown emphatically did "not decide" whether "this vice of prosecutorial self-contradiction warrants the continued survival of [the] *Jones*' [rule of] 'automatic' standing," but instead reserved that question for a case where possession at the time of the contested search and seizure is an essential element of the charged offense. *Brown v. United States, supra* at 228-229.

Explained in the factual context of the *Jones* decision, the prohibition against "prosecutorial self-contradiction" is erected on the premise that "to hold that [the defendant's] failure to acknowledge interest in the narcotics [seized] or the premises [searched] prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." *Jones v. United States, supra* at 263.

In *Jones,* the defendant's "conviction flow[ed] from his possession of the narcotics at the time of the search," and "[y]et the fruits of that search, upon which the conviction depend[ed], were admitted into evidence on the ground that [the defendant] did not have possession of the narcotics at that time." *Id.* at 263. Under such a Janus-faced approach, the prosecution "thus subject[s] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." *Id.* at 263. When allegations of police misconduct in violation of individual rights are evaluated in the context of a criminal prosecution, "[i]t is not consonant with the amenities, to put it midly, of the administration of criminal

justice to sanction such squarely contradictory assertions of power by the Government." *Id.* at 263-264. Consequently, "[t]he possession on the basis of which [a defendant] is to be. . . convicted suffices to give him standing under any fair and rational conception" of the circumstances which qualify a defendant as a "person aggrieved by an unlawful search and seizure." *Id.* at 264.

"In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial." *Id.* at 264.

When a person is "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure," the failure to extend to that person standing implied in law ("automatic" standing) to contest the legality of the search and seizure may "compel the injustice of an internally inconsistent conviction." *Jones v. United States, supra* at 264.

The incongruity contemplated in *Jones* is readily apparent where the prosecution at the suppression hearing defeats the defendant's standing claim by vigorously asserting that the defendant has failed to demonstrate any possessory interest in the premises searched or the evidence seized,[14] but then at trial presents witnesses whose testimony is solely calculated to establish a sufficient possessory connection between the accused and the seized evidence to sustain a conviction of the charged possession offense.

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[14] "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois, supra* at 131 n.1, citing *Simmons v. United States, supra* at 389-390, and *Jones v. United States, supra* at 261.

The hypothetical illustrates the concern expressed in *Jones* that a rule of "automatic" standing is needed to preclude "the injustice of an internally inconsistent conviction." *Jones v. United States, supra* at 265. It is the danger and inherent injustice of the "internally inconsistent conviction" which so devastatingly refuted the government's argument in *Jones* that an accused "must establish his standing to suppress the evidence [at the suppression hearing] and may not wait to rest standing upon the Government's case at the trial." *Id.* at 264.

To prevent the occurrence of "an internally inconsistent conviction," the *Jones* decision directed that "[t]he government must, in any event, not permit a conviction to be obtained on the basis of possession, without the merits of a duly made motion to suppress having been considered." *Id.* at 265 n.1.

The "vice of prosecutorial self-contradiction" has been criticized as a deficient justification for the continuation of the "automatic" standing rule on the ground that "there is no logical reason that the definition of possession accepted in interpreting criminal statutes delineate the sphere of a person's reasonable expectation of privacy." *United States v. Hunter,* 550 F.2d 1066, 1074 (6th Cir. 1977), citing Trager and Lobenfeld, The Law of Standing Under the Fourth Amendment, 41 Brooklyn L.Rev. 421 (1975). Those advancing this criticism against "automatic" standing emphasized that "[t]he Fourth Amendment and the criminal law have different purposes": the "Fourth Amendment protects a reasonable expectation of privacy," while "the criminal law is instituted to protect society from certain acts or kinds or behavior." *Id.*

The fallacy of this critique is its predication upon a fundamental misconception of the legal analysis which

generated the condemnation of prosecutorial self-contradiction in *Jones*. Proponents of this criticism intuitively conclude that "[t]he logics of the *Jones* automatic standing rule impliedly assumed that one charged with a possessory offense has had personal Fourth Amendment rights violated." *United States v. Hunter, supra* at 1073.[15] Of course, *Jones* contained no such assumption, implicit or otherwise. Instead, the *Jones* decision mandated only that when possession of the seized evidence is itself an essential element of the offense charged, "the Government is precluded from denying that the defendant had the requisite possessory interest to challenge the admission of the evidence." *Simmons v. United States, supra* at 390.

Jones did not equate as legally synonymous possession in the context of Fourth Amendment rights with possession as an element of a criminal offense. Rather, this Court in *Jones* acknowledged that in limited situations - where possession of the seized evidence at the time of the contested search is an essential element of the charge - constitutional concepts of fairness will not permit "squarely contradictory assertions of power by the Government . . . to compel the injustice of an internally inconsistent conviction." *Jones v. United States, supra* at 263-264.

The "automatic" standing rule does not dictate a determination in favor of the defendant on the merits of his Fourth Amendment claim; it only insures that the merits of

[15]According to this indictment of the "automatic" standing principle, "the implied assumption of the 'automatic standing' rule that one charged with a possessory offense has had personal Fourth Amendment rights violated by the illegal search that discovered the contraband becomes crucial because that assumption links the Fourth Amendment and possession in a way that makes prosecutorial self-contradiction the only possible support for the 'automatic standing' rule." *United States v. Hunter, supra* at 1073-1074.

the constitutional issue will be reached.

When the prosecution's entire case - the offense charged, the theory of the offense, and the supporting evidence - ultimately depend on the defendant's possession, as construed under the applicable penal law, of the evidence seized during the challenged search, it is difficult to conceive a persuasive and compelling argument to justify providing the state with the prerogative of denying at a suppression hearing that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *See Rakas v. Illinois, supra* at 140.

The requirement of "automatic" standing to alleviate "the vice of prosecutorial self-contradiction" is in no way predicated upon the principles of a "target" theory of standing.[16] "Automatic" standing does not depend on nor require a determination that the defendant was the "target" of the search. To the contrary, the very nature of the charge and the prosecution's theory of the case trigger the applicability of the "automatic" standing rule. Consequently, "the substantial administrative difficulties" and "practical difficulties" which would necessarily attend a "target" theory of standing are not present under "automatic" standing. *See Rakas v. Illinois, supra* at 136-137.

The doctrine of "automatic" standing, an exception to the general precept that Fourth Amendment rights cannot be asserted vicariously, "is designed to fight the '"vice of prosecutorial self-contradiction,"' by preventing the government from adopting the antithetical positions of charging possession as an element of a crime while denying that there was sufficient possession to entitle the accused to challenge the legality of the search by which the evidence was

[16]This Court has expressly rejected the "target" theory of standing. *Rakas v. Illinois, supra* at 133-138.

secured." *United States v. Reyes,* 595 F.2d 275, 279 (5th Cir. 1979), citing *United States v. Oates,* 560 F.2d 45, 53 (2nd Cir. 1977). *See United States v. Cobb,* 432 F.2d 716, 722 (4th Cir. 1970); *United States v. Boston,* 510 F.2d 35, 37-38 (9th Cir. 1974).

Even assuming *arguendo* that *Simmons* completely eliminated the dilemma of self-incrimination, the "vice of prosecutorial self-contradiction" and its corollary result - "the injustice of an internally inconsistent conviction" - would nevertheless mandate the continued adherence to the doctrine of "automatic" standing.

B. PETITIONER WAS ENTITLED TO ACTUAL STANDING TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE HE CLAIMED OWNERSHIP OF THE SEIZED PROPERTY.

Assuming *arguendo* that petitioner was not entitled to "automatic" standing to contest the search and seizure at bar, he still met his burden of establishing actual standing due to his admission of ownership of the drugs seized from Ms. Cox's purse both at the time of the search and later at the suppression hearing (T.E., pp. 28-29, 31, 47, 100-101, 149-150; T.S.H (I), p. 9; T.S.H. (II), pp. 3-4, 20; App., pp. 34, 42-43, 51-52).

This Court has repeatedly acknowledged the constitutional tenet that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.

Jones noted that a defendant moving to suppress evidence obtained as a result of an alleged illegal search and seizure could satisfy "the conventional standing requirement" by

claiming, *inter alia,* "to have owned or possessed the seized property." *Jones v. United States, supra* at 261.

In *Simmons v. United States,* 390 U.S. 377 (1968), a prosecution for a non-possessory offense, a suitcase containing evidence incriminating the defendant was found in the basement of a house belonging to another. On motion to suppress the defendant testified that the suitcase was his. This Court recognized that, "[u]nder the standing rules set out in *Jones,* there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing." *Simmons v. United States, supra* at 390. "The only, or at least the most natural way in which [the defendant in *Simmons*] could found standing to object to the admission of the suitcase was to testify that he was its owner." *Id.* at 391. "Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim." *Id.*

In *Mancusi v. DeForte,* 392 U.S. 364, 367 (1968), confronted with the question of "whether DeForte [had] Fourth Amendment standing to object to the seizure of the records," this Court immediately focused on the defendant's interest in the seized property. After noting that "[t]he papers which were seized . . . belonged not to DeForte but to the Union," this Court concluded that the defendant could, therefore, "have personal standing only if, as to him, the search violated" his interest in the premises searched. *Id.*

In *Combs v. United States,* 408 U.S. 224 (1972), "where the property sought to be suppressed had been stolen and was seized from the farm of [the] defendant's father, and defendant neither lived there nor was present at the time of the search, [this] Court remanded for a standing determination, thereby intimating that one would have a privacy interest in stolen goods sufficient to confer standing." 3

LaFave, Search and Seizure, *supra*, §11.3, p. 559.

Again in 1973, this Court reiterated that "[u]nder the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence." *Brown v. United States*, 411 U.S. 223 (1973). To illustrate this point, this Court suggested that the defendants in *Brown* "could have asserted, at the pretrial suppression hearing, a possessory interest" in the evidence seized to establish standing. *Id.* at 228.

Recently in *Rakas v. Illinois, supra*, this Court reconsidered the portion of the *Jones* decision which dealt with standing based on an interest in the premises searched and the principles that should control such cases. However, the substance of the opinion reaffirmed the principle recognized in *Jones* that a possessory or ownership interest in the evidence seized confers actual standing. *United States v. Mazzelli*, 595 F.2d 1157, 1160 (9th Cir. 1979).

For example, in *Rakas* this Court initially emphasized the failure of the defendants to assert a claim of ownership over the items seized. *Rakas v. Illinois, supra* at 130-131 n.1. This comment implicitly recognizes that a possessory interest in the seized evidence confers standing to challenge the search and seizure. Later in the decision, after asserting that a "casual visitor" to the premises should not be able to contest the impropriety of the search, this Court added that "[t]his is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search. *Rakas v. Illinois, supra* at 142 n.11.

Finally, in holding that the defendants' claim in *Rakas* must fail, this Court stressed that "[t]hey asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized.*" *Rakas v. Illinois, supra* at

148 (emphasis added).

The *Rakas* opinion repeatedly endorses the proposition that actual standing is established by a possessory or ownership interest in the property seized.

Although the Supreme Court of Kentucky in the case at bar did not explicitly speak to the concept of actual standing created by a possessory interest in the property seized, the court below did acknowledge petitioner's "admitted ownership of the drugs," but concluded that petitioner had "not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated." *Rawlings v. Commonwealth, supra* at 349, 350. This holding, however, implicitly denies that a possessory or ownership interest in the items seized from the person or premises of another will confer actual standing. Expressed in the language of *Rakas*, the holding below inferentially presumes that a possessory or ownership interest in seized property is not "an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra* at 140.

There can be no doubt, either historically or analytically, that the Fourth Amendment was designed to protect against governmental infringement of an actual ownership or possessory interest in the property seized, even when the seizure occurred during a search of the person or premises of a third party.

This conclusion is not undermined by the oft quoted precept that "[a] person who is aggrieved by an illegal search and seizure *only* through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois, supra* at 134 (emphasis added), citing *Alderman v. United States*, 394 U.S. 165, 174 (1969). The distinction is that when a person has an

actual ownership or possessory interest in the seized property, he is not only aggrieved by the introduction at trial of the evidence seized from the third person, he is also aggrieved by the government's infringement of his actual possessory interest in the property seized, an interest protected by the Fourth Amendment.

"An individual's right to privacy from governmental intrusion into his personal effects does not require that he have physical control of the property." Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 Emory L.J. 111, 119 (1974). "He can reasonably expect that his lawfully possessed 'effects' will remain undisturbed upon premises where they have been lawfully placed or in the custody of a third party to whom they are lawfully entrusted." *Id.*

The key factor in this "standing" analysis is that the defendant must demonstrate an *actual* ownership or possessory interest in the property seized. In certain instances, the decision to deny a defendant entitlement to challenge the search and seizure is in reality based not upon a rejection of the principle that an interest in the seized property confers standing, but upon a determination that the alleged possessory or ownership interest was non-existent at the time of the contested search and seizure. *See, e.g., United States v. Wilson,* 536 F.2d 883, 885 (9th Cir. 1976), *cert. denied,* 429 U.S. 982 (1976); *United States v. Archbold-Newball,* 554 F.2d 665, 677-679 (5th Cir. 1977), *cert. denied,* 434 U.S. 1000 (1977). For example, proof that the seized property had been sold or abandoned by the defendant prior to the contested search and seizure would defeat his claim that he had at the time of the search an actual ownership or possessory interest in the seized property protected by the Fourth Amendment.

In the instant case the evidence presented at the pretrial suppression hearings clearly indicated that petitioner maintained ownership of the drugs in question even though he placed those drugs in Vanessa Cox's purse prior to the contested search and seizure (T.S.H. (I), pp. 6-9, 11-12; T.S.H. (II), pp. 3-7, 20; App., pp. 32-35, 42-44, 51). In fact, the prosecution's theory of the case as presented at trial was that at the time of the search Vanessa Cox possessed the drugs in her purse at petitioner's request and that at no time prior to the search had petitioner relinquished his ownership of the drugs (T.E., pp. 12-15, 23-24, 28-29, 31, 47, 100-101, 149-150).

Petitioner's actual ownership or possessory interest in the seized drugs clearly entitled him to contest the legality of the search of Vanessa Cox's purse.

Despite this Court's repeated endorsements of the principle that a possessory or ownership interest in the evidence seized confers actual standing, various federal courts have expressly held that a defendant's possessory interest in items seized does not entitle him to contest the search of another's premises or property. *See United States v. Jackson,* 585 F.2d 653, 656-659 (4th Cir. 1978); *United States v. Smith,* 550 F.2d 277, 283 (5th Cir. 1977), *cert. denied,* 434 U.S. 841 (1977); *United States v. Hunter,* 550 F.2d 1066, 1074-1075 (6th Cir. 1977); *United States v. Galante,* 547 F.2d 733, 739 (2nd Cir. 1976), *cert. denied,* 431 U.S. 969 (1977); *United States v. Lisk,* 522 F.2d 228, 230-231 (7th Cir. 1975), *cert. denied,* 423 U.S. 1078 (1976).

In a representative decision, *United States v. Lisk, supra,* the defendant had placed a bomb in the trunk of an automobile belonging to Hunt and had told Hunt to keep the bomb until the defendant requested its return. Five days later

the bomb was seized from the trunk of Hunt's car by the police. The defendant contended that he had a property interest in the bomb which established his entitlement to contest the search of Hunt's car and the seizure of the bomb. *Id.* at 229-231.

In denying the defendant standing to contest the legality of the search of the vehicle, the *Lisk* court initially propounded the following analysis:

> There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence. *Id.* at 230.[17]

Employing this analysis, *Lisk* reasoned that any violation of the Fourth Amendment generated by the search of Hunt's car "is clearly not available to the defendant as a basis for suppressing evidence acquired thereby." *Id.* However, due

[17]In 1951 in *United States v. Jeffers,* 342 U.S. 48, 52 (1951), this Court specifically rejected a government theory which proposed, as does *Lisk,* that a search and seizure may be severed into separate components to facilitate analysis of the Fourth Amendment standing questions. The government argued in *Jeffers* that "the search did not invade [the defendant's] privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized." *United States v. Jeffers, supra* at 52. In response to the government contention that "[t]he significant act" was "the seizure of the goods of the [defendant] without a warrant," this Court explained that it did "not believe the events are so isolable." *Id.* "Rather [the search and seizure] are bound together by one sole purpose - to locate and seize the narcotics of [the defendant]." *Id.* "The search and seizure are, therefore, incapable of being untied." *Id.* In anticipatorily disposing of the analytical underpinnings of the *Lisk* decision, this Court in *Jeffers* emphasized that "[t]o hold that this search and seizure were lawful as to the [defendant] would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *United States v. Jeffers, supra* at 52.

to the defendant's "ownership of the bomb," the "defendant has standing to object to the seizure, but no standing to object to the search." *Id.* at 230-231. Under this theory, the "[d]efendant must relay on the seizure of the [bomb] as a violation of his own Fourth Amendment rights" and the legality of that seizure must be evaluated "as though the [bomb] had been found in a public place and then seized." *Id.* at 230. Then, "[i]f the seizure was lawful, the evidence is admissible against [the] defendant." *Id.*

The *Lisk* opinion and its progeny misperceive the nature of the privacy interest created by an actual ownership or possessory interest in the item seized. "*Lisk* has been properly criticized for failing to take account of the privacy expectation which attends a bailment relationship." 3 LaFave, Search and Seizure, *supra,* §11.3, p. 560. The decision in *Lisk* "should have discussed in greater detail the reasonableness of the defendant's expectation that the car's trunk would be free from governmental intrusion." Note, 64 Geo. L.J. 1187, 1195-1196 (1976). "The better view, therefore, is that there is standing pursuant to a bailment arrangement because the bailor has 'sought to maintain the security and privacy of his possession' in a place 'he regarded . . . as a safe place for storage.' " 3 LaFave, Search and Seizure, *supra,* §11.3, p. 561, citing Note, 64 Geo. L.J. 1187, 1196 (1976).

By holding that an ownership or possessory interest in the item seized confers standing to contest only the seizure, the *Lisk* decision becomes an ineffectual methodology for evaluating "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra* at 140. For example, if a defendant hides his gun in a neighbor's house without the neighbor's consent and the

police search the neighbor's residence illegally, the defendant should be able to challenge the seizure of the gun but not the search of the house because he had no cognizable Fourth Amendment interest in the neighbor's premises. *See* Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo.L.Rev. 1, 52 (1975). If, on the other hand, the neighbor consented to the defendant hiding the weapon in the neighbor's house, the defendant "would then have a right to privacy and could contest a search which resulted in the seizure of [the] gun." *Id.*

Under *Lisk*, however, the defendant in each of the scenarios would be denied the opportunity to challenge the legality of the search which resulted in the seizure of his gun on the theory that the search could not possibly have violated any Fourth Amendment interest of the defendant.

In the instant case the evidence seized as a result of the search of Vanessa Cox's purse included contraband drugs. Although the Supreme Court of Kentucky in its opinion below made no reference to the contraband nature of the seized drugs in deciding the issue of petitioner's entitlement to contest the search and seizure, comment on this point is warranted because of the frequent contention of the prosecution that the Fourth Amendment was not designed to protect against governmental infringement of a possessory or ownership interest in contraband. *See United States v. Galante, supra* at 739; *United States v. Sacco,* 436 F.2d 780, 784 (2nd Cir. 1971).

In *United States v. Jeffers,* 342 U.S. 48, 52 (1951), the contention was raised that "no property rights within the meaning of the Fourth Amendment exist in [seized] narcotics . . . because they are contraband in which Congress [had] declared that 'no property rights shall exist.'"

Dismissing that argument, this Court in *Jeffers* explained that, even when "the evidence illegally seized [is] contraband," it is nevertheless the defendant's "property, for purpose of the exclusionary rule" and he is "entitled on motion to have it suppressed as evidence on his trial." *United States v. Jeffers, supra* at 54. *See Combs v. United States, supra.*

A determination of the contraband nature of the property seized is an artificial factor for evaluating whether a defendant has a cognizable Fourth Amendment interest in the evidence seized from a third party.

When the question is discussed "[i]n expectation-of-privacy terms . . . it is difficult to see how it can be concluded that if A is permitted to leave certain effects on B's property, his reasonable expectations as to the security of that place from police intrusion are somehow affected by the [contraband] nature of those effects." 3 LaFave, Search and Seizure, *supra,* §11.3, p. 559.

The fallacy of the argument that a defendant has no right to base standing on possession or ownership of contraband property is based on the failure to appreciate the distinction between a person's inability to assert his "wrongful" presence at a place as "a substantial possessory interest in the premises searched" and his right to assert that his ownership or possessory interest in the seized property, albeit contrabnd, conferred upon him a sufficient interest in the person or premises of another to merit Fourth Amendment protection.

If the touchstone for ascertaining whether a Fourth Amendment interest has been violated is the nature of the seized property, *e.g.,* contraband drugs, rather than the nature of a person's interest in that property, then the determination of standing to contest an alleged illegal search

and seizure will be expanded in many instances into a miniature replica of the trial on the merits. For example, if the defendant alleges a possessory or ownership interest in the seized drugs, the prosecution to defeat his claim will be required to prove with competent evidence that the drugs in question are actually contraband under the penal statutes of the jurisdiction. Undoubtedly this will require the prosecution to present at the suppression hearing expert witnesses to establish the identity of the seized substance. Of course, if the defendant could establish that he owned the drugs without knowledge of their contraband nature or that he possessed them pursuant to a valid prescription, this type of evidence would seemingly revive a cognizable Fourth Amendment interest in the seized property. Obviously such a methodology for making the initial determination of whether a person is entitled to contest the legality of a particular search and seizure is fraught with "very substantial administrative difficulties" and the necessity of "lengthy hearings." *See Rakas v. Illinois, supra* at 136-137.[18]

In the instant case the evidence revealed that, prior to the initial arrival of the police at the Marquess' residence,

[18]The difficulties in such an approach are legion. Assume a defendant is charged with possession of a stolen pistol and murder. The pistol was seized from a third party to whom the defendant had entrusted it for safekeeping. The only evidence which links the defendant to the murder is the seized pistol which, according to ballistics experts, is the murder weapon. When the defendant moves to suppress the pistol as the product of an illegal search and seizure, the trial judge on the basis of prosecution evidence that the weapon is stolen property decides that the defendant has no standing to contest the search because he can have no legitimate possessory interest in stolen property. At trial the jury finds the defendant not guilty of possession of the stolen gun, but on the basis of the defendant's possessory interest in the pistol convicts him of murder. Under such circumstances, "the injustice of an internally inconsistent conviction" is apparent. *See Jones v. United States, supra* at 264.

petitioner had placed the drugs and an address book in Vanessa Cox's purse (T.E., pp. 12-15, 23-24, 35, 100; T.S.H. (II), pp. 3-4, 20; App., pp. 35, 42-43, 51-52). When Ms. Cox in compliance with a police order emptied her purse, the drugs and an address book were revealed (T.E., pp. 13, 16-17, 19, 28, 45-46, 47, 50-51, 149, 155; T.S.H. (I), p. 8; App., p. 33). During the course of the trial the drugs and the notebook were introduced into evidence (T.E., pp. 157-159).

These facts demonstrate that petitioner had an actual possessory or ownership interest in the address book which was seized as a result of the search of Ms. Cox's purse. Obviously, petitioner's address book may not be characterized as either contraband or, under the record at bar, stolen property. Consequently, petitioner need not premise his actual standing on a possessory interest in contraband. However, this factual situation illustrates the deficiencies which inhere in denying a cognizable Fourth Amendment interest in the property seized simply because of its nature. When, as in the instant case, a defendant entrusts various items to another person for safekeeping, does the contraband nature of some, but not all, of the items deny the defendant a right to contest the illegality of the search that results in the seizure of all the property? On the other hand, does the existence of at least one item of noncontraband nature confer on the defendant an entitlement to challenge the search of the third party and to seek suppression of all the seized evidence whether contraband or not?

The contention that the contraband nature of the property seized negates a Fourth Amendment interest is in conceptualization strikingly similar to the waiver arguments rejected in *Michigan v. Tyler,* ____ U.S. ____ , 98 S. Ct. 1942, 1948 (1978), and *Mincey v. Arizona,* ____ U.S. ____

, 98 S. Ct. 2408, 2413 (1978). "[T]his reasoning would impermissibly convict the suspect even before the evidence against him was gathered." *Mincey v. Arizona, supra,* 98 S. Ct. at 2413. "[A] conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *Michigan v. Tyler, supra,* 98 S. Ct. at 1948.

Because the concept of standing generated by an actual possessory or ownership interest in the property seized from the person or premises of a third party remains constitutionally viable, petitioner on the basis of his admitted ownership of the drugs seized from Ms. Cox's purse was entitled to contest the illegality of that search and seizure.

C. PETITIONER WAS ENTITLED TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE THAT SEARCH VIOLATED HIS REASONABLE EXPECTATION OF PRIVACY.

In its opinion below the Kentucky Supreme Court concluded "that the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." *Rawlings v. Commonwealth, supra* at 350.

The Kentucky Supreme Court observed that, "[f]or what it is worth, [petitioner] testified at the suppression hearing that when he placed the drugs in Vanessa Cox's purse, he did not expect or feel that the purse would be free from the intrusion of the officers." *Id.*[19]

[19]During the defense examination of petitioner at the suppression hearing, one of petitioner's counsel asked: "Do [sic] you expect that Vanessa Cox's purse would be free from intrusion by these officers as

(continued)

The majority opinion in *Rawlings* reasoned that "[t]here is a factor of the risk that Vanessa Cox might consent to a search of her purse together with the always present possibility of inadvertent exposure of the drugs." *Id.* "Considering the totality of the circumstances," the Kentucky Supreme Court held "the search did not violate [petitioner's] legitimate or reasonable expectations of freedom from governmental intrusion into the purse" and that there was not "a sufficient showing that [petitioner's]

(footnote continued from preceding page)

you sat there?" (T.S.H. (II), p. 13; App., p. 48). At that point, the prosecutor objected, claiming that defense counsel was "calling for a legal conclusion" (T.S.H. (II), p. 13; App., p. 48). The trial judge announced his ruling with a strict qualification:

> He [petitioner] can answer it, but you are right about that. What he [petitioner] thought or didn't think or what he now says he thinks doesn't have anything to do with it (T.S.H. (II), p. 14; App., p. 48).

The defense counsel then rephrased the question and the following colloquy occurred:

> Q72 Did you feel that Vanessa Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?
>
> Q No sir (T.S.H. (II), p. 14; App., p. 48).

At the conclusion of this examination, petitioner was asked "if he expected the purse to be private" and he answered in the affirmative (T.S.H. (II), p. 15; App., p. 49).

Petitioner and the prosecutor at the inception of cross-examination engaged in the following exchange:

> Q1 Did you consider that purse to be private for your personal possessions, Mr. Ralings[sic]?
>
> A Well, I didn't expect her to go telling everybody (T.S.H. (II), p. 15; App., p. 49).

Moments later petitioner testified that the "purpose for putting all these [drugs] in [Ms. Cox's purse] purse" was because he "didn't want them to be seen" (T.S.H. (II), pp. 16-17; App., pp. 49-50).

legitimate or reasonable expectations of privacy were violated." *Id.*

To determine whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure, "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." *Rakas v. Illinois, supra* at 140. "That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.*

"[T]he capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois, supra* at 143, citing *Katz v. United States,* 389 U.S. 347, 353 (1967).

In the instant case petitioner "took normal precautions to maintain his privacy." *Rakas v. Illinois, supra* at 152 (Powell, J., concurring). Petitioner placed various items including the drugs in Ms. Cox's purse; this was done with her knowledge.

A defendant "has standing to attack the search of [another's] suitcase only if he had a reasonable expectation of privacy with respect to that [suit] case." *United States v. Wilson,* 536 F.2d 883, 885 (9th Cir. 1976). A defendant's "expectation [of privacy] perhaps could be implied if he had entrusted his belongings to [another] for storage in [the other's] bag." *Id.* at 885, citing *Mancusi v. DeForte, supra* at 368-370.

As explained above, petitioner's ownership or possessory interest in the items he placed in Ms. Cox's purse created a

legitimate expectation of privacy. Gutterman, "A Person Aggrieved," *supra* at 119. It must be remembered that this Court "has not altogether abandoned use of property concepts in determining the privacy interests protected by [the Fourth] Amendment." *Rakas v. Illinois, supra* at 144 n.12.

The dissenting justice in *Rawlings* correctly observed, petitioner "was entitled to expect that governmental officials would intrude into the purse only with consent or by complying with the Fourth Amendment." *Rawlings v. Commonwealth, supra* at 352. Of course, as the majority below notes, petitioner had to be aware of the risk that Ms. Cox "might consent to a search of her purse" or that the drugs might be revealed through "inadvertent exposure." *Id.* at 350. Despite these two potential risks to petitioner's expectation of privacy in Ms. Cox's purse, it is obvious that it was not unreasonable for petitioner to expect that the items he entrusted to Ms. Cox for storage and even transportation in her purse would remain private to the rest of the world. This "expectation of privacy" was "more than a subjective expectation of not [having the items] discovered," it was an "expectation" that "society is prepared to recognize as 'reasonable.'" *Rakas v. Illinois, supra* at 143-144 n.12, citing *Katz v. United States, supra* at 361 (Harlan, J., concurring).

This Court in *Rakas* recognized that even under a "legitimate expectation of privacy" test to determine a defendant's entitlement to challenge the legality of a search and seizure "the inquiry . . . is the same" as was previously utilized under the "concept of standing." Consequently, the preceding analysis and argumentation developed above on the question of "automatic" and actual standing amply demonstrate petitioner's entitlement to contest on the merits

the constitutionality of the search of Vanessa Cox's purse and the attendant seizure of his property found in the purse. *Rakas v. Illinois, supra* at 139.

In the final analysis petitioner was constitutionally entitled to contest the legality of the search of Ms. Cox's purse on three distinct, but "invariably intertwined concepts" - the "automatic" standing rule, standing generated by an actual possessory or ownership interest in the property seized, and a "reasonable and legitimate expectation of privacy." All three of these methdologies function to demonstrate that the police search of Ms. Cox's purse and the seizure of petitioner's personal property "infringed an interest of [the petitioner] which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra* at 140.

II.

THE SEARCHES AND SEIZURES WHICH PRODUCED THE CONTRABAND DRUGS AND OTHER INCRIMINATING EVIDENCE WERE THE FRUITS OF THE UNCONSTITUTIONAL ARRESTS OF BOTH PETITIONER AND VANESSA COX IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

The searches of both Vanessa Cox and petitioner, the seizure of evidence from both parties, and the statements by both parties incriminating petitioner were the fruits of the unlawful arrests of Ms. Cox and petitioner and, consequently, must be suppressed. *Dunaway v. New York,* ____ U.S. ____ , 98 S. Ct. 2248 (1979); *Wong Sun v. United*

States, 371 U.S. 481 (1963); *United States v. Ceccolini,* ____ U.S. ____ , 98 S. Ct. 1054, 1060 (1978); *Brown v. Illinois,* 422 U.S. 590 (1975).

Petitioner's right to challenge the illegality of the detention of Ms. Cox and its taint of the subsequent search of her purse and her statements to the police is predicated on petitioner's entitlement to contest the illegality of the search of her purse and the seizure of drugs he owned from that purse (see Argument I, *supra*).

Regardless of whether petitioner is entitled to challenge the detention of Ms. Cox and the ensuing search of her person and effects, he is clearly entitled to raise the constitutional impropriety of his own detention and the effect of that detention on both the search of his person and his self-incriminating statements obtained during the unlawful detention.

Police officers, armed with a warrant for the arrest of Lawrence Marquess, forcibly entered his residence. During the course of the search of the residence for Marquess, the officers noted the odor of burned marijuana in the house[20] and in Lawrence Marquess' bedroom observed on a mantel what appeared to be marijuana seeds.[21] The police officers

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[20]"When [he] first entered the house," Detective Railey "smelled [marijuana smoke] and [he] smelled it on into the living room" and in "Mr. Sadler's bedroom [which] was kind of between the living room and the entrance" (T.S.H. (I), p. 4; App., p. 31). At trial Detective Railey testfied that "[u]pon entering the residence" he "smelled smoke, marijuana smoke in the air in the entrance way . . . and through the bedroom and . . . in the living room area" (T.E., pp. 133-134). Detective Railey added that he "smell[ed] marijuana [smoke] in the whole house" (T.E., p. 135).

[21]"As [he] came back through one of the bedroomns," Detective Railey "noticed what looked like some seeds laying on a mantel in one of the bedrooms" (T.S.H. (I), pp. 4-5; App., p. 31). At trial Detrective Railey testified that he "saw what appeared to be some marijuana seeds laying on the mantle" in the bedroom of Lawrence Marquess (T.E., p. 134).

then decided that a search warrant for the house was needed and two of the officers departed to procure the warrant.

During the forty-five minute wait for the two officers to secure the search warrant, the five individuals present, including petitioner, were detained in the living room and were informed by the officers that they could not leave the room or the premises unless they consented to a search of their person.[22] Two of the individuals were permitted to leave after submitting to a search.

In his dissenting opinion in petitioner's case, Justice Lukowsky of the Kentucky Supreme Court reasoned that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." *Rawlings v. Commonwealth, supra* at 350, citing *Wong Sun v. United States, supra.* Justice Lukowsky contended that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search . . . constituted an arrest because it significantly deprived those individuals of their freedom of action." *Rawlings v. Commonwealth, supra* at 350, citing *Terry v. Ohio, supra.* The dissenting justice added that this "was not

[22]At the initial suppression hearing Detective Railey testified that "apparently the other police officers told [the people present at the Marquess residence] they had to stay until [he and another officer] got back" with the search warrant (T.S.H. (I), p. 14; App., p. 36). It was Detective Railey's "understanding" that "if every individudal would consent to a search of their person, they would be [allowed] to leave" the Marquess residence, and "if not, they would have to wait for [the officers] to return" (T.S.H. (I), p. 14; App., p. 36).

Petitioner testified at the second suppression hearing that he was required to sit in the living room while the officers went to procure a search warrant (T.S.H. (II), pp. 8-9; App., p. 45). When petitioner "asked if [he] could leave" and repeatedly inquired "why [he] was being held there, two police officers came back into the room and said, 'if you all will consent to a bodily search, you can leave' " (T.S.H. (II), p. 10; App., p. 46).

an investigatory stop but an arrest because the detention here went well beyond the bounds of permissible investigatory stops." *Rawlings v. Commonwealth, supra* at 350. However, the Kentucky Supreme Court in its majority opinion below "disregarded as irrelevant the detention during the period in which the officers were procuring a search warrant." *Rawlings v. Commonwealth, supra* at 350.[23]

There can be little doubt that petitioner, Vanessa Cox, and the three other people present were "seized" when they were told by the police that they must remain at the Marquess residence unless they "consented" to a search of their persons and effects. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio, supra* at 16, cited with approval in *Dunaway v. New York, supra,* 99 S. Ct. at 2253 n.6.

According to Vanessa Cox - a prosecution witness, she, petitioner, and the other three persons present "were detained on the couch" (T.E., p. 25). She explained that petitioner "got up to get a drink of water, and [the police] told him to sit back down" because "no one [was allowed to] move anywhere" (T.E., pp. 25-26, 38). After approximately "ten or fifteen minutes," the police "said that if [Ms. Cox and the others] would consent to a search of [their] persons and possessions," they could leave "if [they] were not residents of the household" (T.E., pp. 26, 40). The other three persons present at the time - Dennis Saddler, Keith Northern, and Linda Braden - corroborated Ms. Cox's explanation of the detention (T.E., pp. 111, 192, 195).

[23]The decision of the Kentucky Supreme Court in the instant case was rendered on May 1, 1979 and the mandate issued on May 22, 1979. This Court decided *Dunaway v. New York, supra,* on June 5, 1979.

Detective Bivens acknowledged at trial that he "was instructed to keep [all] occupants of the house in one room in the living room of the house to watch all of them until they returned with a search warrant" (T.E., p. 153). According to Detective Railey's trial testimony, petitioner and the others were "being held for investigation" (T.E., p. 171).

Ms. Cox indicated on redirect examination that she "would have left on foot if [she] had not been detained" (T.E., p. 59).

Recently in *Dunaway v. New York*, this Court concluded that the police "violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took [the defendant] into custody, transported him to the police station and detained him there for interrogation." *Id.*, 99 S. Ct. at 2253, 2258.

Citing to *Davis v. Mississippi*, 394 U.S. 721 (1969), and *Brown v. Illinois*, 422 U.S. 590 (1975), this Court in *Dunaway* concluded that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Dunaway v. United States, supra*, 99 S. Ct. at 2258.

In all but certain "narrowly defined intrusions,"[24] this

[24] *Terry v. Ohio, supra* (a brief, on-the-spot stop on the street and a frisk for weapons); *Adams v. Williams*, 407 U.S. 143 (1972) (frisk for weapons on basis of reasonable suspicion); *Pennsylvania v. Mimms*, 434 U.S. 196 (1977) (order to get out of car is permissible "de minimis" intrusion after car is lawfully detained for traffic violations; frisk for weapons justified after "bulge" observed in jacket); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (brief investigative stop of automobiles by roving border patrols to check for illegal immigrants); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint to stop and check vehicles for aliens); *Delaware v. Prouse*, ____ U.S. ____, 99 S. Ct. 139 (1979) (random checks for drivers' licenses not permitted on less than articulable reasonable suspicion). *See Dunaway v. New York, supra*, 99 S. Ct. at 2255-2256.

Court has emphatically demanded adherence to "the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York, supra*, 99 S. Ct. at 2257.

"The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an " 'arrest' under state law." *Dunaway v. New York, supra*, 99 S. Ct. at 2256. "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment." *Davis v. Mississippi*, 394 U.S. 721, 762 (1969). "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." *Id.* "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' " *Id.* at 726-727.

The warrantless arrest/detention of petitioner and the other people present at the Marquess residence was unconstitutional because it was not supported by probable cause to arrest.[25]

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Michigan v. DeFillippo*, ____ U.S. ____, 99 S. Ct. 2627,

[25] "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed [by the person to be arrested]." *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949), quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925), cited with approval in *Dunaway v. New York, supra*, 99 S.Ct. at 2254 n.9.

2631 (1979), citing *Ker v. California,* 374 U.S. 23, 37 (1963), and *Johnson v. United States,* 333 U.S. 10, 15 and n.5 (1948).

Under Kentucky law a police officer may make an arrest without a warrant for a misdemeanor only when the offense is committed in his presence. KRS 431.005(1).[26] In Kentucky the first offense of possession of marijuana for sale is a misdemeanor. KRS 218A.990(4).[27] Similarly, the possession of marijuana for personal use is also a misdemeanor. KRS 218A.990(7).[28]

"The facts that the police officers smelled the odor of burnt marijuana and inadvertently discovered a few marijuana seeds in 'plain view' in Marquess' room created probable cause for the police officers to obtain a search warrant for the premises, but did not establish that a

[26]KRS 431.005(1) provides that "[a] peace officer may make an arrest in obedience to a warrant, or without a warrant when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony." The Kentucky "statute governing arrest, KRS 431.005, codifies the common law rule and does not authorize a peace officer to arrest on suspicion of a misdemeanor as it does on suspicion of the commission of a felony, but limits arrest for a misdemeanor to one committed in the presence of the arresting officer." *Johnson v. Commonwealth,* Ky., 443 S.W.2d 20, 22 (1968).

[27]KRS 218.A.990(4) provides that "[a]ny person who knowingly and unlawfully manufactures, sells, or possesses with intent to sell marijuana shall, for the first offense, be confined in the county jail for not more than 1 year or be fined not more than $500, or both." Nothing in the record indicates any basis for a belief that marijuana was being possessed for purpose of sale or that any of the individuals present had been previously convicted of this offense. onsequently, no evidence of record would "provide the police officers with reasonable grounds to believe a felony had been committed by anyone." *Rawlings v. Commonwealth, supra* at 351 n.2 (Lukowsky, J., dissenting).

[28]See note 2, *supra.*

misdemeanor was being committed in their presence by any of the individuals on the premises." *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting). "The odor of burnt marijuana is merely evidence that marijuana has been smoked on the premises at sometime in the past" and "does not establish that marijuana is present on the premises at the time the odor is detected." *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting). "Only the odor of either unburned marijuana or burning marijuana would indicate the actual presence of marijuana on the premises." *Id. See, e.g., People v. Hilber,* 403 Mich. 312, 269 N.W.2d 159 (1978); *State v. Schoendaller,* Mont., 578 P.2d 730 (1978). As Detective Railey candidly admitted, the smell of burned marijuana in the air "is not a violation [of the criminal law] at all" without reference to its source (T.E., p. 172). In fact, Vanessa Cox, a key prosecution witness, testified on direct examination that none of the people present at the residence had smoked marijuana there on the day in question (T.E., p. 33).

Similarly, "[t]he presence of the seeds in Marquess' room did not create probable cause to believe that any of the individuals in the living room possessed marijuana even with the presence of the odor of burnt marijuana." *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting).[29]

[29]The visual recognition of contraband marijuana seeds, *i.e.,* those which are capable of germinating, may not be a relatively simple task. "Depending on the variety, healthy mature seeds (which are botanically achene nuts) vary in size between 1/12 and 1/4 inches in length . . . Seed colors range from a buff through a dark brown, and from light grey to almost black colors. Often seeds are mottled with brown on black spots, bars, or lines on a lighter field. Green or whitish seeds are usually immature and will germinate feebly if at all. Fresh seeds have a waxy glimmer and a hard, intact shell. Shiny, very dark brown or black seeds often mean the contents are fermented and the embryo is dead." Frank & Rosenthal, *Marijuana Grower's Guide* (Berkeley 1978), p. 47.

In the instant case the total absence of individualized probable cause to arrest is demonstrated by the police decision to detain *all* five persons found on the premises. As this Court recently emphasized, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois,* ____ U.S. ____, 100 S.Ct. 338, 342 (1979), citing *Sibron v. New York,* 392 U.S. 40, 62-63 (1968).

As the dissenting judge in the decision of the intermediate court below observed, "[i]t requires no citation of authority to note that an officer may arrest an individual when that person commits a misdemeanor in the policeman's presence" (App., p. 71). The dissent then emphasized that "[t]he law enforcement agent must *observe* the offense but more importantly, he must also observe the actor so engaged in the illegal activity" (App., p. 71). In the instant case, according to the dissenter, "absolutely no one was seen doing anything" (App., p. 71).

Under the facts and circumstances of the case at bar, it is undeniable that the police lacked probable cause to arrest either Ms. Cox or petitioner.

The detention of Ms. Cox and petitioner "was in important respects indistinguishable from a traditional arrest." *Dunaway v. New York, supra,* 99 S.Ct. at 2256. All of the persons present were specifically informed by the police that they could not leave the premises unless they would agree to waive a Fourth Amendment right and submit to a search of their person and effects. The period of detention lasted approximtely forty-five minutes during which the detainees were under the personal supervision of some four or five police officers (T.E., p. 41).

Admittedly the police in the instant case did not transport

the five individuals to a police station, however the police did detain Ms. Cox and petitioner in a place which was not their home for approximately forty-five minutes. Certainly the fact that the police seize a person for a substantial period of time without transporting him to a police station would not exempt the police from adhering to the probable cause standard. To permit such an exception would be to encourage police offers to deviate from routine procedures when detaining people on the theory that a seizure divested of the traditional garb of an arrest may be deemed by the courts to be less of a seizure.

While no actual interrogtion occurred prior to the searches, the seizure of Ms. Cox and petitioner are in no way "roughly analogous to the narrowly defined intrusions involved in *Terry* and its progency." *Dunaway v. New York, supra,* 99 S.Ct. at 2256.

Under the facts of the instant case, petitioner, Vanessa Cox, and one other individual were detained for approximately forty-five minutes. The detention was not accomplished as a formal arrest and it was not for the purpose of custodial interrogation. Nevertheless, under the *Dunaway* analysis, this detention of petitioner and the others was an "investigatory seizure" which intruded so severely on the interests protected by the Fourth Amendment that it could be justified only on the basis of probable cause to arrest.

Assuming *arguendo* that this Court concludes that the detention of petitioner was unconstitutional, it is obvious that the search of petitioner's person and the seizure of the knife and money were tainted by this illegal arrest and must be suppressed. *Wong Sun v. United States, supra.*

On the basis of the same primary illegality, petitioner's admissions of ownership of the drugs found in Ms. Cox's

purse must be suppressed. *Brown v. Illinois, supra.* Absent his unlawful detention, petitioner would not have been present to respond to Ms. Cox's indications that the drugs in her purse belonged to him. Although *Miranda* warnings were apparently given to all three individuals before the search of their persons commenced, (T.S.H. (I), pp. 6, 10; T.S.H. (II), p. 11; App., pp. 32, 35, 46; T.E., p. 119), nothing in the record indicates that the police ascertained whether the individuals understood the rights and elected to waive them before questioning began (T.E., pp. 31, 47, 100-101, 149-150; T.S.H. (I), pp. 9, 11-12; App., pp. 34-35).

In view of "[t]he temporal proximity of the arrest and the confession," the absence of "intervening circumstances," and "the purpose and flagrancy of the misconduct," petitioner's confession must be suppressed. *Brown v. Illinois, supra* at 603-604. Petitioner's statements to the police occurred within an hour of his detention and the only intervening event of significance was the police required Ms. Cox to reveal the contents of her purse and to indicate who owned the contraband found in her possession.

Additionally, the detentions of both petitioner and Ms. Cox were, "both in design and execution . . . investigatory." *Brown v. Illinois, supra* at 605. The detention was admittedly for "investigation" purposes (T.E., p. 171). Additionally, the police used the detention as leverage to compel the five individuals to submit to a search of their persons and effects as a condition precedent to being freed from police restraint. *Id. Dunaway v. New York, supra,* 99 S. Ct. at 2259-2260.

Assuming *arguendo* that this Court decides that petitioner is constitutionally entitled to contest the illegality of the search of Ms. Cox's purse and the seizure of the drugs in her

possession (see Argument I, *supra*), it is obvious that under the principles espoused in *Dunaway* the unconstitutional detention would taint the subsequent search of her purse and the seizure of the drugs. *Wong Sun v. United States, supra.* Of course, once the drugs are suppressed, Ms. Cox's references to those items in connection with petitioner's ownership of them must also be suppressed. *Id.*[30]

Petitioner submits that no attenuation analysis for a live witness under *United States v. Ceccolini,* ____ U.S. ____, 98 S. Ct. 1054 (1978), is necessary in this factual context. But, in any event, Ms. Cox's decision to remain silent for forty-five minutes of police detention when she knew that her purse contained a large amount of contraband drugs which belonged to petitioner reveals that her eventual decision to tell the police that the drugs belonged to petitioner was motivated not by a "willingness of the witness to freely testify" but as a direct result of the illegal detention and the accompanying unconstitutional search which revealed contraband in her purse. *United States v. Ceccolini, supra,* 98 S. Ct. at 1060-1061.

As the dissenting justice in the Kentucky Supreme Court explained, "[a]ll evidence discovered [in the case at bar] was a result of this unlawful detention and should be suppressed as 'fruit of the poisonous tree.'" *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting).

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[30] "If [an] object is inadmissible [under the exclusionary rule], then the [police] officer may not testify concerning the fact of its discovery, nor may others ordinarily give testimony concerning that property when the testiony is made possible only by virtue of the prior illegal seizure." 3 LaFave, Search and Seizure, *supra,* §11.4, p. 667.

III.

THE FOURTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE SEARCH OF VANESSA COX'S PURSE AND THE SEIZURE OF ITS CONTENTS WHEN THAT SEARCH WAS CONDUCTED PURSUANT TO A WARRANT WHICH AUTHORIZED ONLY A SEARCH OF THE PREMISES OF THE RESIDENCE IN WHICH SHE WAS A VISITOR.

In the instant case the police officers detained Ms. Cox, petitioner and, at least initially, three other people for periods of up to forty-five minutes while they sought to secure a warrant to search the premises in question. When the police returned, they had only a warrant to search the premises, yet they prefaced their search of the residence with a search of the three remaining people - Ms. Cox, petitioner and Dennis Saddler.

Assuming *arguendo* that this Court finds that petitioner is constitutionally entitled to challenge the search of Ms. Cox's purse and the attendant seizure of the drugs which were emptied from that purse (see Argument I, *supra*), then the warrantless search of Ms. Cox's purse was unconstitutional and the evidence seized from within must be suppressed since no exigent circumstances existed.

"[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona,* ____ U.S. ____, 98 S. Ct. 2408, 2414 (1978).

Because the Kentucky Supreme Court in the instant case

held that petitioner lacked standing to contest the merits of the search of Ms. Cox's purse, that court did not reach the issue at bar. Nevertheless, the Kentucky Supreme Court observed that "the officers returned with a search warrant, authorizing a search of the premises," but "[t]here was no authority for the search of individuals on the premises." *Rawlings v. Commonwealth, supra* at 349.[31]

Similarly, the intermediate appellate court below in the instant case noted that "the departed officers returned with a search warrant for the premises," but "[t]he warrant did not authorize a search of individuals on the premises" (App., p. 61-62).

At the initial suppression hearing Detective Railey justified his search of the persons present on the basis that when he read the search warrant to the three people present and advised them of their rights, he felt that "some of them might have fear of being arrested" (T.S.H. (I), p. 6; App., p. 32). He made his "protective search" of their persons and effects because he believed the search warrant "gave [the three individuals] cause to be alarmed" (T.S.H. (I), p. 10; App., p. 34). Amplifying on this theory, Detective Railey explained that if, pursuant to the search warrant, the police found any narcotics in the house, these people "would be arrested" (T.S.H. (I), p. 15; App., p. 37). For this reason, Detective Railey "felt at that time that [these three people] were or could be a danger" (T.S.H. (I), p. 15; App., p. 37). Detective Railey "always search[es] everyone [he] arrest[s] or prior to

[31]The dissenting justice in the Kentucky Supreme Court remarked that, "[a]lthough not articulated in the majority opinion, it must be assumed from its tenor that if Cox had been challenging the validity of the search instead of [petitioner] the court would have held the search to be unreasonable under the Fourth Amendment and ordered the evidence suppressed." *Rawlings v. Commonwealth, supra* at 350 n.1 (Lukowsky, J., dissenting).

their arrest if [he] thinks they may be dangerous to [him] or to other officers" (T.S.H., p. 7; App., p. 32). However, at trial Detective Railey testified that he believed the search warrant for the Marquess residence authorized him to "search any individual" there (T.E., pp. 168, 169).

Each person who was present in Lawrence Marquess' residence on October 18, 1978 "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure." *Ybarra v. Illinois,* ____ U.S. ____, 100 S. Ct. 338, 342 (1979). "That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by" Lawrence Marquess, the person who resided at the house in question. *Id.*, 100 S. Ct. at 342. "Although the search warrant, [if] issued upon probable cause, gave the officers authority to search the premises," it "gave them no authority whatever to invade the constitutional protections possessed individually by" the persons legitimately on the premises. *Id.*, 100 S. Ct. at 342-343.

"[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois, supra* at 342, citing *Sibron v. New York,* 392 U.S. 40, 62-63 (1968).

"[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place." *Id.*, 100 S. Ct. at 343 n.4. "The warrant for the [Marquess residence] provided no basis for departing from this general rule." *Id.* In the instant case, "the warrant itself" did not authorize "the search of unnamed persons in a place." *Id.*

No distinction in the instant case may be drawn between Ms. Cox's personal effects and the purse. It is true that

during her detention Ms. Cox and petitioner were seated on the couch with the purse between them (T.E., pp. 27, 45, 141; T.S.H. (I), p. 6; App., p. 32). The purse was in close proximity to Ms. Cox and the police treated the purse as her property, not as an adjunct of the premises. For example, one of the officers ordered Ms. Cox to stand and empty her purse onto the table (T.E., pp. 144, 155). Under these circumstances, the purse must be considered a personal effect of Ms. Cox, not a part of the premises.

It should be noted that Detective Railey neglected to seek a search warrant for the people present at the Marquess residence when he went to obtain a warrant to search the premises (T.S.H. (I), p. 19; App., p. 39; T.E., p. 167). This decision not to seek prior judicial authorization to search the persons of the people present may have been based on his real belief that the odor of burnt marijuana and the presence of seeds resembling marijuana seeds would not justify a search of those persons (see Argument II, *supra*). In any event the opportunity to obtain a search warrant for the detained individuals existed contemporaneously with the opportunity to obtain the search warrant for the premises. This factor should not be overlooked.

In any event, *Ybarra* controls the case at bar and precludes the use of the warrant to search the premises as a basis for searching the people present at the time the warrant is executed.[32]

As previously explained, the prosecution and the police officers attempted to justify the search of Ms. Cox on the grounds that efear for their personal safety, under the circumstances of the case, motivated and permitted their

[32]This Court decided *Ybarra v. Illinois, supra,* on November 28, 1979, approximately six months subsequent to the Kentucky Supreme Court's decision in the case at bar.

actions. However, Detective Railey testified that before the search warrant was obtained the police "didn't suspect that [these people] were fearful of being arrested or anything like that" (T.S.H. (I), p. 15; App., p. 37).

The initial search of Ms. Cox's purse "was simply not supported by a reasonable belief that [she] was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." *Ybarra v. Illinois, supra,* 100 S. Ct. at 343.[33]

When the police entered the Marquess residence and discovered the five people there, they did not recognize petitioner or any of the others present "as a person with a criminal history" nor did they have "any particular reason to believe" that any of the five persons "might be inclined to assault them" (T.E., pp. 161, 173). *See Ybarra v. Illinois, supra,* 100 S. Ct. at 343.

For a forty-five minute period from the time the police entered the Marquess residence until they required Ms. Cox to empty the contents of her purse onto a table, the police had an extensive opportunity to observe the people who were found on the premises. No violence or disruptions of any sort occurred during the detention period.

The police initially entered the premises on the stength of an arrest warrant for Lawrence Marquess. In turn, the arrest warrant was based on an indictment against Marquess for trafficking in Schedule I controlled substances. According to police testimony at trial, Marquess, some three or four months prior to the issuance of the arrest warrant, had at his

[33]Parenthetically, it must be remembered that the search of Ms. Cox's purse exceeded the scope of the permissible patdown authorized by *Terry*. Even had the requirements of *Terry* been met, the officers could have merely separated Ms. Cox from her purse before they commenced their search of the residence. This would have protected the police without compromising Ms. Cox's Fourth Amendment rights.

Bowling Green residence sold a quantity of LSD to an undercover agent (T.S.H. (I), p. 3; App., p. 30; T.E., p. 179). Consequently, the three or four months which had elapsed since the LSD sale could have done little to convince the police that the Marquess residence was at the time of their entry being used as sale place for LSD. In a similar vein it must be remembered that the personal use of marijuana and the possession of marijuana are simply misdemeanors in Kentucky. As a result, the police had no real basis to conclude that the residence in question was a hot bed of drug trafficking.

In the final analysis, the prosecution was "unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that [Vanessa Cox or petitioner were] armed and dangerous." *Ybarra v. Illinois, supra,* 100 S.Ct. at 343.

"Under [the *Terry*] doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." *Ybarra v. Illinois, supra,* 100 S.Ct. at 343.

"Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v. Illinois, supra,* 100 S.Ct. at 343-344. "The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.*

Discussing the inherently incredible testimony of the police officers in the instant case, the dissenting judge in the intermediate court opined that "[t]he unconvincing testi-

mony of the police is to the effect that once the search warrant was read they all experienced fear for their safety emanating from [the] three detainees . . . to such an extent that it became necessary to . . . conduct the in depth or inside the outer clothing search" (App., p. 73). "It is incredulous that the policemen experienced the sudden fear they claimed they did after joining with [petitioner] and his friends for better than a half hour listening to phonograph records" (App., p. 73).

According to the trial court, "[t]he problem before the Court on the Motion to Suppress is to determine whether or not the exigencies of the circumstances as stated permitted the officers to search the parties before beginning a search of the residence for which they had a search warrant or would a search of the persons without a search warrant for their search be in violation of the 4th Amendment to the Constitution" (T.R., p. 93; App., p. 20).

The trial court found "that the officers were in a place where they had a right to be and that they had a right and legal authority to search the house pursuant to the search warrant, and that the exigencies of these circumstances in that knowing that this residence had been used for the sale of Lysergic Acid Diethylamide in the past and that there was a gun in the house; that their search of the premises had to do with the presence of contraband, the possession of which constituted a crime and that therefore a perfunctory search of the persons, including the contents of Mrs. Cox's purse, was permitted under the 4th Amendment to the Constitution and, as a matter of fact and common sense was a required procedure" (T.R., p. 93; App., p. 20).

In *Ybarra* this Court specifically rejected a similar request "to construe the Fourth and Fourteenth Amendments to permit evidence searches of persons who, at the commence-

ment of the search, are on 'compact' premises subject to a search warrant, at least where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.' " *Ybarra v. Illinois, supra,* 100 S.Ct. at 344-345.

Assuming *arguendo* that this Court decides that petitioner is constitutionally entitled to contest the illegality of the search of Ms. Cox's purse and the seizure of the drugs in her possession (see Argument I, *supra*), then the principles delineated in *Ybarra* and *Terry,* both *supra,* dictate that the warrantless search of the purse and the seizure of the drugs, under the factual circumstances of the case at bar, must be deemed unconstitutional. Accordingly, the drugs and other items should have been suppressed and all references to those items excluded from petitioner's state trial. 3 LaFave, Search and Seizure, *supra,* §11.4, p. 667. Of course, petitioner's admissions of ownership of the drugs found in Ms. Cox's purse must likewise be suppressed since the antecedent reference for petitioner's remarks was the illegally seized evidence. *Wong Sun v. United States, supra.* Petitioner's statements of ownership were the direct result of the police confronting both Ms. Cox and him with the illegally seized evidence and the police questioning Ms. Cox and then petitioner to ascertain ownership of the drugs.

The prosecution's improper use of both the items, including the drugs in question, illegally seized from Ms. Cox's purse and petitioner's tainted admissions of ownership of the drugs renders petitioner's state court conviction constitutionally invalid and mandates reversal of the conviction below.

IV.

THE SEARCH OF PETITIONER'S PERSON, OSTENSIBLY CONDUCTED INCIDENT TO A VALID ARREST, VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS SINCE PROBABLE CAUSE FOR THE ARREST WAS PREDICATED ON THE FRUITS OF A PRIOR ILLEGAL SEARCH AND SEIZURE OF CONTRABAND DRUGS.

After commenting that the search of petitioner's person did "not involve such complicated principles as the search of the purse," the Kentucky Supreme Court "validate[d] this search on the theory of a search incident to a valid arrest." *Rawlings v. Commonwealth, supra* at 350. Although concerned that "the sequence of the search of the purse and [petitioner's] admission of ownership of the drugs is not clearly established in the record," the Kentucky Supreme Court held that "[c]learly, after [petitioner] admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest." *Rawlings v. Commonwealth, supra* at 350, citing *Cupp v. Murphy,* 412 U.S. 291 (1973).

Obviously, this analysis is susceptible to severe challenge. "[T]he search of [petitioner's] person was unlawful because it was not incident to a valid arrest." *Rawlings v. Commonwealth, supra* at 352 (Lukowsky, J., dissenting). "The 'second' arrest upon which the search was based was itself unlawful because it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse." *Id.*

Assuming *arguendo* that this Court rules, first, that petitioner is constantly entitled to challenge the search of Ms. Cox's purse and the attendant seizure of the contraband

drugs (see Argument I, *supra*) and, second, that the search of that purse and the seizure of its contents were constitutionally improper (see Arguments II and III, *supra*), then the virtually contemporaneous arrest and search of petitioner, predicated on the prior illegality, were the "fruits" of the poisonous tree" and any evidence obtained thereby must be suppressed.

"If the police conduct an illegal search and as a consequence discover evidence which provides probable cause that a particular person has committed a crime, an arrest of that person based upon this informtion is unquestionably tainted, provided of course the arrestee had standing to object regarding the antecedent search." 3 LaFave, Search and Seizure, *supra,* §11.4(e), p. 646. However, "the mere existence of such a prior illegal search does not inevitably taint a subsequent arrest, for it may be that the arrest will be found to have a sufficiently factual basis apart from the illegal search." *Id.* The constitutional test under the Fourth Amendment is whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become 'so attenuated as to dissipate the taint.' " *Wong Sun v. United States, supra* at 487.

In the instant case, virtually no time elapsed between the primary illegality and the search and arrest of petitioner; similarly, no intervening circumstances occurred. All in all, no factor exists which arguably could dissipate the taint of the primary illegality.

Accordingly, the items seized during the search of petitioner were required to be suppressed and excluded in all manner from petitioner's state trial. This failure to suppress constituted a substantial violation of petitioner's Fourth and Fourteenth Amendment rights which mandates reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Kentucky affirming petitioner's conviction should be reversed upon the grounds delineated above.

Respectfully submitted,

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